No. 496.

FEB 18 1899
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

Brf. of Paine for Appt. (mo

Chickasaw Nation

THE UNITED STATES,
APPELLANT,

Filed Feb. 18, 1899.

No. 496.

RICHARD C. WIGGS ET AL.

Appeal from the District Court in the Chickasaw Nation.

MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLANT.

HALBERT E. PAINE,
Atty for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 496.

Chickasaw Nation
THE ~~UNITED STATES~~, APPELLANT,

v.

RICHARD C. WIGGS ET. AL.

Appeal from the District Court in the Chickasaw Nation.

Motion to Dismiss Appeal.

BRIEF FOR APPELLANT.

HALBERT E. PAINE,
Atty for Chickasaw Nation.

If this motion shall prevail, all the Chickasaw appeals, sixty-eight in number, will be dismissed, and also all the appeals from the Cherokee, Choctaw, Creek, and Seminole nations. The result will be to enroll thousands of white persons as citizens of those nations and to deprive the nations of from one to two millions of acres of their lands and of a considerable part of their large trust funds

now held by the United States. The importance of this proceeding, therefore, demands a careful examination of the questions involved in the motion.

I.

The judgments rendered in this case by the "Commission to the Five Civilized Tribes," known as the Dawes Commission, and by the district court in the Chickasaw nation were both void for want of jurisdiction.

All the powers possessed by the United States, except such as may have been acquired by treaties with other nations, are inherent powers of sovereignty, recognized and secured by the law of nations. Many of them are enumerated, regulated, and distributed among the different departments of the government, by the constitution; but none are derived from it. The constitution is the creature, not the creator, of the sovereign state. I will assume, for the purposes of the argument merely, that these inherent powers include the power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations; and that the possession of this power results from the paramount dominion held by the United States over all the territories within the exterior boundaries of the nation. But this power, if vested in the United States, is not included among those distributed, by the constitution, among the three departments of the government; nor is its exercise "necessary and proper" for carrying into execution any of those powers. It is included among the "reserved powers." Its exercise has never been intrusted to congress, or to any other department of the government. It is reserved, not to the states, but to the people.

The constitutional provision that, "congress shall have

power to regulate commerce with the Indian tribes," does not confer upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations. This will be plainly apparent, when we examine the text of the constitution, and consider the relations which, at the time of its adoption, existed between the United States and those nations. The following are the words of the constitution :

The congress shall have power,—3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Looking at the words alone, we see, at once, that the regulation of commerce with foreign nations, or among the several states, or with the Indian tribes, has no possible connection with the determination of questions of citizenship in foreign nations, or in the states, or in the Indian tribes. We see, too, that, if these words were effectual to authorize congress to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, they would also authorize congress to invest such tribunals with jurisdiction to determine who are citizens of the several states and of foreign nations.

The reason why foreign nations and the Indian tribes are placed in the same category, in this clause of the constitution, is readily found. At the time of the adoption of the federal constitution, the relations between the United States and the Indian nations were acknowledged, by the United States, to be relations between treaty-making powers. Treaties were made between Great Britain and the Chickasaws and Choctaws, during the colonial period ; and twenty-three treaties have, from time to time, been made with those nations, by the United States. They were regarded by the United States as *nations*,—not, indeed, as nations wholly independent of the United States,—

but as nations capable of making treaties with the United States. Their relations to the United States, at the time of the adoption of the constitution, as acknowledged by the United States, have been accurately defined in the opinions of the supreme court. In Worcester *v.* Georgia, 6 Pet. 515, 547, 557, 559, Chief Justice Marshall, delivering the opinion of the court, said:

> Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only. * *
>
> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged, but guarantied, by the United States. * *
>
> The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected, in our diplomatic and legislative proceedings, by ourselves, each having a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

In Cherokee Nation *v.* Georgia, 5 Pet. 1, 15, Chief Justice Marshall said:

> They have been uniformly treated as a state, from the settlement of our country. The numerous treaties, made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

We have, then, no difficulty in understanding why the power to regulate commerce with the Indian tribes and the power to regulate commerce with foreign nations were placed on the same footing, in this paragraph of the constitution. It becomes clear, too, that the apparent effect of this clause is its real effect. It becomes clear that, if this provision empowers congress to invest tribunals, of its own creation, like the Dawes Commission, or the Chickasaw district court, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, it also confers upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of France and of Mexico, and who are British, German, or Russian subjects.

This would be all different if the constitution had invested congress with power, over the Chickasaw and Choctaw nations, broad enough, in scope, to include the regulation of their citizenship, as well as of their commerce with the United States. For then the principle established by the supreme court, in the case of The American Ins. Co. *v.* Canter, 1 Pet. 513, soon to be considered, would have been applicable to this case. Then it would have become competent for congress to invade the Choctaw and Chickasaw nations, and to do there what it could not do in one of the states,—that is to say,—to invest with judicial powers a tribunal, whose judges did not hold office during good behavior,—a mere "legislative court," not a component part of the constitutional judiciary of the United States. Then the power to invest the Dawes Commission, and the district courts in the Chickasaw nation, with jurisdiction of these citizenship cases, would have been "necessary and proper for carrying into execution" a power expressly conferred upon congress, by the constitution.

In American Ins. Co. *v.* Canter, 1 Pet. 513, 546, Chief Justice Marshall, delivering the opinion of the court, said:

> It has been contended that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall, from time to time, ordain and establish." Hence it has been argued that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.
>
> We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior court of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power, conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government, or in virtue of that clause, which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction, with which they are invested, is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress, in the execution of those general powers, which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised, in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government.

In this case of The American Ins. Co. *v.* Canter, the necessary power over the territories having been conferred upon congress, by the constitution, the question was, whether it was competent for congress to employ, in the execution of that power, a court, which was not a constitutional court, but to use the words of the chief justice, was a mere "legislative court." That question was decided in the affirmative. And if the constitution had conferred upon congress power over the Chickasaw and Choctaw nations, as broad as that conferred upon congress over the territories, the principles established in that case would uphold the jurisdiction of the Dawes Commission and of the Chickasaw district court, in these citizenship

cases. But the constitution has not conferred on congress such power over the Chickasaw and Choctaw nations.

The power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, has not been entrusted expressly or by implication to any department of the government of the United States. It is reserved to the people; and, until the people shall, by constitutional amendment, or otherwise, confer that power upon congress, it cannot be exercised by congress. It follows that, the judgments of the Dawes Commission and of the district court are void, for want of jurisdiction.

Is it contended that, congress has acquired the power to invest tribunals, of its own creation, with jurisdiction of these citizenship cases through treaties with the Chickasaws and Choctaws? The answer to this claim is fourfold. No treaty, between the United States and the Chickasaws or Choctaws, confers, or purports to confer, any such power. But if a treaty conferred this power upon the *United States*, it would, for reasons already explained, be incompetent for congress to exercise the power, without authority from the people, granted by an amendment of the constitution, or otherwise. If a treaty purported to confer this power upon *congress* specifically, it would not be competent for congress to exercise the power, without authority from the people. But then, the Chickasaw nation cannot, by stipulation, confer upon the congress, or the courts, of the United States, powers, or jurisdiction, interdicted by the constitution. The constitution of the United States cannot be altered by a treaty with the Chickasaw nation, any more than by an act of the Chickasaw legislature.

II.

For the purposes of the argument, I assume, for the present, that it was competent for congress to invest the

"district court," for the Chickasaw nation, with appellate jurisdiction of these citizenship cases. That being assumed, I submit that it was also competent for congress to enact the statutory provision of June 28, 1898, authorizing appeals in these cases from that court to the supreme court. The power to authorize appeals is not a judicial power. It is a legislative power. The exercise of this power is a legislative, and not a judicial act. Courts can neither authorize nor prohibit appeals, nor prescribe the time or manner of taking them. All they can do is to decide whether the appellant complies with the terms prescribed by the law. The right of appeal is independent of judicial discretion. If the party has done all that the statute requires to entitle him to his appeal, and its allowance is refused, a mandamus lies to compel the allowance. United States *v.* Gomez, 3 Wall. 72; United States *v.* Adams, 6 Wall. 101.

If the law in force, at the date of the judgment, permit an appeal, within a limited period, and the unsuccessful party fail to appeal, within the time prescribed, he may justly be held to have waived his right of appeal. But congress is competent to authorize an appeal, after judgment even by a constitutional court, in the absence of antecedent authority for an appeal.

In 1836 an inquisition by a jury, condemning certain lands for a railway company, was ratified and confirmed by a court of competent jurisdiction. Five years afterwards, in 1841, the legislature of the state passed an act directing the court to set aside the inquisition, and cause a new inquisition to be made. The court thereupon made an order setting aside the inquisition. The case was taken, by writ of error, to the supreme court of the United States, under section 25 of the judiciary act. The railway company contended that the act of 1841 was

unconstitutional and void. But the supreme court, in Railway Co. *v.* Nesbitt, 10 How. 395, held the act to be valid, and said:

> This intervention was simply the award of a new trial of the proceedings under the inquisition, which proceedings were of no avail as a judgment, after such new trial was allowed. This intervention too was the exercise of power, by the legislature, supposed, by that body, to belong legitimately to itself; whether this authority was strictly legislative, or judicial, according to the distribution of power in the state government, was a question rather for that government than for this court to determine.

In Calder *v.* Bull, 3 Dall. 386, the legislature of Connecticut had set aside a decree of an inferior court, and granted a new trial in the same court, with right of appeal to the supreme court of the state. The supreme court of the United States held that there was, in the constitution of Connecticut, no line of demarcation, which excluded the legislature from the performance of judicial acts, and that the law setting aside the decree and directing a new trial was valid. The principle established by this decision of the supreme court is that, the incompetence of the legislature to grant even new trials, results, not from any general principles of jurisprudence, but from constitutional provisions expressly or by implication separating the legislative from the judicial department of the government. But if, in the absence of a constitutional provision separating the legislative from the judicial powers of the government, it is competent for the legislature to exercise the power of granting a new trial, which is unquestionably a judicial power, then *a fortiori* must it be competent for the legislature, under such a constitution, to exercise the legislative power of authorizing an appeal.

Now, although the constitution permits no United States court to exercise judicial powers within a state, unless its judge holds his office during good behavior, the supreme court in American Ins. Co. *v.* Canter, 1 Pet. 515,

546, cited above, holds that it is competent for congress to confer judicial powers upon territorial courts, whose judges hold office only for limited periods. But it is not between such courts and the legislature, that the line of separation, between the legislative and judicial departments and powers of the government, is drawn, in the federal constitution. That line is drawn between the legislature and the constitutional judiciary; not between the legislature and mere legislative courts, or tribunals. The decisions in Calder *v.* Bull and American Ins. Co. *v.* Canter, then, taken together, not only make it lawful for congress to exercise the legislative power of authorizing appeals in these cases, but even go so far as to make it lawful for congress to exercise the judicial power of granting new trials. The question, whether congress properly authorized these appeals, is, under the decisions just cited, not a question of constitutional power or of legal competence, but wholly a question of justice and public policy.

In Sampeyreac *v.* United States, 7 Pet. 234, one of the questions was, whether it was competent for congress, by an act passed May 8, 1830, to authorize a review, by the same court, of a decree rendered at the December term, 1827, it appearing that Sampeyreac was a fictitious person. That question was decided in the affirmative. The court said:

> If Sampeyreac was a real person, and appeared here setting up this objection, it might present a different question; *although it is not admitted, even in that case, that the United States would be concluded as to the right.*

Another question was whether the act of May 8, 1830, by retrospective operation, gave the court jurisdiction of a bill of review filed in April, 1830. This question also was decided in the affirmative. The court said:

> It is said that if this bill of review was filed under the act of 1830, the court had no jurisdiction, the bill having been filed in April, and the law

not passed until the May following. But the act in terms applies to bills filed, or to be filed, and of course cures the defect if any existed. Such retrospective effect is no uncommon course. The act of 1803, amending the judicial system of the United States, 3 Laws U. S. 560, declares that from all final judgments or decrees, rendered or to be rendered, in any circuit court, &c., an appeal shall be allowed to the supreme court.

In Converse *v.* Burrows, 2 Minn. 191, the court said:

A preliminary objection was taken on the argument, by the counsel of the respondents, that this was not an appealable case, as the act providing for an appeal from an order granting a new trial, was passed after the allowance of the order in the case at bar. The provision, under which this appeal is brought, is found in the amendments of Rev. Stat. by Sess. Laws of 1856, p. 13, ch. 5. The object of the act is evidently to extend the right of appeal beyond what previously existed. It is a remedial law and should receive a liberal construction. It provides a remedy in a case where otherwise injustice might be done, and should be given effect, in all cases where proceedings have not been had to such an extent as to exclude its application. Statutes of this nature may be construed *ultra* but not *contra*, the strict letter, (1 Kent, 465) and the doctrine that statutes, retrospective in their effect, are unconstitutional is held not to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb vested rights (1 Kent. 455.) We cannot perceive how the act giving the right of appeal, in this case, impairs, in any manner, the contract between the parties, or affects any vested right of the defendants. The same reasoning as in the case of Grimes *v.* Bryne (argued at the present term) here applies, and the objection cannot be sustained.

In *Ex parte* Bibb, 44 Ala. 140, the court said:

There certainly cannot now be any doubts as to the power of the legislative department of the government to pass a law authorizing the opening of judgments and the grant of new trials. This has been an authority uniformly exercised, by the government of this state, from its commencement, and has never, so far as I know, been seriously questioned.

In Prout *v.* Berry, 2 Gill, 147, an act of the legislature granting an appeal, in a particular case, after the expiration of the time for appeal limited by the general law, was held to be valid. In State *v.* Railway, 18 Md. 193, it was held that, the legislature may, after judgment, pass an act authorizing an appeal, in a case where, by the general law, no appeal could lie.

In Jackson *v.* Lamphire, 3 Pet. 280, 290, the court said:

It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is

the same whether the deed is dated before, or after, the passage of the recording act.

This opinion was quoted and adopted in Curtis *v.* Whitney, 13 Wall. 68.

In Chadwick *v.* Moore, 8 Watts and Searg. 49, it was held that an act, which suspended, for a reasonable time, the execution of a judgment on a previous contract, was not prohibited by the tenth section of the first article of the constitution of the United States, and that, therefore, the statute enacted by the legislature of Pennsylvania in 1842, suspending, for a year, a sale, on execution, for less than two-thirds of the appraised value, was not unconstitutional in respect of its retrospective operation. In Mason *v.* Haile, 12 Wheat. 370, the supreme court held the following resolutions, adopted in 1815 and 1816, respectively, by the legislature of Rhode Island, to be valid:

On the petition of Nathan Haile, praying, for the reasons stated, that the benefit of an act entitled, "An act for the relief of insolvent debtors," passed in the year 1756, be extended to him, voted that said petition be continued till the next session of this assembly, and that, in the meantime, all proceedings against him, the said Haile, on account of his debts, be stayed; and that the said Haile be liberated from his present confinement in the jail, in the county of Providence, on his giving sufficient bond to the sheriff of said county, conditioned to return to jail in case said petition is not granted.

On the petition of Nathan Haile, of Foster, praying, for the reasons therein stated, that the benefit of an act passed in June, 1756, for the relief of insolvent debtors, may be extended to him; voted that the prayer of the petition be and the same is hereby granted

In Goshen *v.* Stonington, 4 Conn. 209, it was held that, an act, declaring all marriages previously celebrated, in that state, by a minister ordained and empowered to celebrate marriages according to the forms and usages of any religious society or denomination, to be valid, was not void by reason of repugnancy to the constitution of that state, or to the constitution of the United States; that it was not void for the reason that it might, in its operation, impair vested rights; that its retrospective

operation was not to be limited, by construction, to the parties to the marriage and their issue; that the circumstance that a law was explicitly retrospective, and might affect the rights of individuals, did not authorize the judiciary to declare it void, if it were just and reasonable and conducive to the general good.

In Savings Bank *v.* Allen, 28 Conn. 97, 102, the court, referring to and approving the case of Goshen *v.* Stonington, said:

> The principle adopted was, in substance, that, when a statute is expressly retroactive and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right, and of public policy affecting the peace and welfare of the community, the law should be sustained.

In Schenley *v.* Commonwealth, 36 Penn. St. 29, 57, Mr. Justice Strong, delivering the opinion of the court, said:

> In Hepburn *v.* Curts, 7 Watts, 300, it was said, "the legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.

In Doe *v.* Lambert, 1 Green's Law Rep. 182, the supreme court of New Jersey decided that a deed, made by the commissioners, in partition proceedings, to any other person than the one reported as purchaser, was void. Thereupon the heirs instituted actions of ejectment, in the circuit court of the United States, in order to recover the property. The grantees then applied to the legislature for relief, and an act was passed validating the conveyance. In Kearney et al. *v.* Taylor et al., 15 How. 494, the supreme court held this act to be valid.

In only five of the cases, cited by the appellee, was it held to be incompetent for the legislature to authorize an appeal, after the rendition of judgment; and in those five

cases, the acts granting the appeals were special acts, applicable only to single cases. Three of them arose under peculiar statutes, under which an appeal was *per se* a supersedeas, and vacated the judgment; and two were decided, without reasoning, on the authority of two others of the five cases. Moreover every case cited, including these five, was a case in which the judgment appealed from had been rendered by a court constituting a part of a constitutional system of judicature, and not by a mere legislative court created by law, outside the constitutional judiciary of the state. The cases were Bates *v.* Kimball, 2 Chip. (Vt.) 77; Standiford *v.* Barry, 1 Aik. 314; Lewis *v.* Webb. 3 Greenl. 326; Durham *v.* Lewiston, 4 Greenl. 140; Hill *v.* Sunderland, 3 Vt. 507.

In Bates *v.* Kimball, 2 Chip. (Vt. 1824) the defendant having neglected to appeal within the time limited by the general law, the legislature authorized an appeal by a special act. The court held that the appeal vacated the judgment, and that the granting of the appeal, by the legislature, was therefore a judicial act. This decision was predicated upon a peculiarity of the Vermont law then in force, which made the appeal *per se* a supersedeas, suspending execution "until after the trial had upon the appeal, or review." There was only one kind of appeal. Compiled Laws of Vt. The statute of the United States makes two kinds of appeals, one suspending, the other not suspending execution. Rev. Stat. sec. 1000. A mere appeal does not *per se* vacate the judgment. It does not *per se* even suspend, or stay, the execution of the judgment. It is the supersedeas, and not the mere appeal, that suspends the execution of the judgment. The only effect of the appeal, unaccompanied by the supersedeas, is to place the cause on the course, which every cause of great moment ought to take, in a well

ordered judicial system,—that is to say, on the way to a final determination by the court of last resort. The act of congress, authorizing appeals in these citizenship cases, did not make the appeal a supersedeas. It did not vacate the judgment. An abandonment of this appeal, by the appellant, or a dismissal of the appeal would leave the enrollment by the district court in force. No new enrollment, by that court, would be necessary. The appeal only placed the cause in the proper channel for reaching a final judgment in the supreme court.

The case of Standiford *v.* Barry, 1 Aik. 314, in which an appeal was authorized by a special act of the Vermont legislature, after the time for appeal limited by the general law had expired, was decided on the authority of Bates *v.* Kimball, with no reasoning on the part of the court. In Lewis *v.* Webb, 3 Greenl. 326, the legislature having, by a special act, authorized an appeal five years after the rendition of the decree, the court held that the granting of the appeal was a judicial act, and was unconstitutional. In Dunham *v.* Lewiston, 4 Greenl. 140, the legislature of Maine had, by a special act, authorized a review of the case. The court, upon the authority of Lewis *v.* Webb, held the act unconstitutional. In Hill *v.* Sunderland, 3 Vt. 507, a statute authorizing an appeal by the town, but not by the opposite party, from a decision of the road commissioners made before the enactment of the statute, is held to be unconstitutional, "as respects the damages and costs awarded to individuals." The peculiarity of the Vermont statute has already been explained.

In the six following authorities cited by the appellee, the question was whether the legislature could set aside a judgment and grant a new trial. No such question is involved in the motion now under consideration. In Young *v.* State Bank, 4 Ind. 301, the court held as follows:

> Now the constitution, above quoted, says the legislature shall not perform a judicial act. The granting of a new trial, we have seen, is a judicial act. Therefore the legislature can not grant a new trial.

In Taylor *v.* Place, 4 R. I. 324, a resolution of the legislature, opening certain judgments of the court of common pleas, in order to admit amended pleadings and affidavits, was held to be unconstitutional. In Davis *v.* Menasha, 21 Wis. 491, a statute requiring every court of the state, upon the application of either party, to vacate and set aside judgments rendered within three years prior to the passage of the act, and to grant new trials, was held to be void. In De Chastellux *v.* Fairchild, 15 Penna. St. 18, the supreme court having rendered a final judgment, the legislature granted a new trial in the court of common pleas. The court held that the power exercised was judicial, and could not be exercised by the legislature. In Atkinson *v.* Dunlop, 50 Me. 111, an act authorizing a review, by the court which rendered the judgment, after the time for review fixed by the general law had expired, was held to be invalid. Section 298 volume 1 of Black on judgments relates not to appeals but only to the vacation of judgments. In Martin *v.* South Salem Land Co., 26 Southeastern, 591, one of the questions was whether an act, prescribing the mode of recovering certain subscriptions, applied to a case in which judgment had been rendered and an appeal taken prior to the passage of the act, thereby necessitating a new trial. The court said:

> It has been uniformly held that the legislature has no power to grant a new trial, or to direct a rehearing, in a cause which has been once judicially settled, and that every such attempt is plainly an invasion of judicial power, and is therefore unconstitutional and void.

The other cases cited by counsel for the appellee have no appreciable weight as authorities in support of the motion. This will appear upon an analysis of those

cases. The question in Pennsylvania *v.* Bridge Co., 18 How. 421, was, not whether congress could grant an appeal to the supreme court, from a judgment previously rendered by an inferior court, but whether congress could annul a decree of the supreme court of the United States. In McCabe *v.* Emerson, 18 Penna. St. 111, the question was whether, after a cause had been adjudicated by the supreme court, on writ of error brought by one party, the other party could bring his writ of error and secure a second adjudication of the same cause by the supreme court. It was held that, if the statute, under consideration, purported to authorize such a proceeding, it was void. In Dash *v.* Van Kleck, 7 Johns. 477, the question was whether an act of the New York legislature could bar a suit brought against a sheriff before the passage of the act, for the previous escape of a prisoner. The court decided that the act could not have that effect.

The ruling in Skinner *v.* Holt, 69 Northwestern, 595, was merely to the effect that, after the rendition of a judgment making the proceeds of a life policy assets of an estate, it was not competent for the legislature to make the same the property of the widow and child. In Saltus *v.* Tobias, 3 Paige, 338, one of the questions was whether a declaratory act could deprive an individual of a vested right, or change the rule of construction of a pre-existing law. The question whether it was competent for the legislature to grant an appeal from a judgment previously rendered, was not involved in the case.

The legislature of Virginia on the 25th of March, 1873, enacted a law which provides that, if a judgment or decree of the class described shall remain unpaid,

> It shall be lawful for the courts, in a summary way, on motion, after ten days' notice, either before or after the issue of execution, to fix, settle and direct at what depreciation, or how, the said judgment or decree shall be discharged, having regard to the provisions of this act,

to the cause of action for which the judgment or decree was recovered, and any other proof, or circumstance, that, from the nature of the case, may be admissible.

In Ratcliffe *v.* Anderson, 31 Gratt. 105, this provision was held to be void.

No authority has been cited for the position that congress cannot, after the rendition of a judgment by a legislative court not organized under the constitution, authorize an appeal to the supreme court of the United States. But the judgment of the supreme court, in the case of Sampeyreac *v.* United States, in which a special act authorizing an appeal from a territorial court was held to be valid, is adverse to that position. The authorities which I have cited, relating to appeals from constitutional courts, are *a fortiori* applicable to appeals from legislative courts, and, therefore, adverse to the contention of the appellees.

The question whether it was competent for congress to authorize an appeal, from the district court in the Chickasaw nation, to the supreme court of the United States, is, in its constitutional aspects, very different from the question, whether congress can authorize an appeal, from a circuit court of the United States, to the supreme court. The circuit court is a component part of one of the three co-ordinate branches of the government of the United States. These three departments are separated by sharply drawn lines of demarcation. All the judicial powers of the United States, conferred or recognized by the constitution, are vested in United States courts, whose judges hold their offices during good behavior. None of those powers can be exercised by the judge of the Chickasaw district court, who holds his office only for a limited term. That court is a mere legislative court, like the territorial court so characterized by Chief Justice Mar-

shall, in American Ins. Co. *v.* Canter. It is the creature of the legislature.

It does not stand on the footing of a constitutional court. It is not completely invested with the powers or rights of courts organized under the constitution. It is not a part of the judiciary, which constitutes one of the three departments of the federal government. Its relations to congress are not identical with those of courts organized under the constitution. It would be a mistake to characterize the regulation of such a court, by congress, as an invasion of the judicial department of the government by the legislature ; for it has no place in the judicial department of the government. Its jurisdictional power, in these citizenship cases, is not to be found among the judicial powers specified in the constitution. It is only a part of the machinery devised by congress for the performance of duties involved in an attempted execution of the power to regulate commerce with the Indian tribes and of some inherent power of sovereignty not specified in the constitution.

If it were a rule of the unwritten law of the United States that, congress could not, by a law enacted after the rendition of a judgment by one of the inferior courts authorized by the constitution, provide for an appeal to the supreme court, that rule would not necessarily be applicable to a court created by congress for the Indian Territory. The constitutional barrier, which separates congress from the federal judiciary, does not separate congress from that court. The regulation of its functions and methods is nothing else than the legitimate control of the creature by the creator, provided such regulation is not inconsistent with the fundamental principles of the government. If there is any question as to the propriety of such regulation in a particular case, it would seem to be not a con-

stitutional or legal question, but rather a question of justice and public policy. The subjection of such vast interests, as are involved in these citizenship cases, to the final determination of a single judge of a legislative court, confirming the reports of a master and overruling the judgments of a tribunal including four able lawyers, with no right of appeal to the supreme court, is so abhorrent to justice as to exclude the application of any possible rule of a constitutional system of judicature, which would negative the right of congress to authorize an appeal, unless its application is absolutely required by the principles on which our government rests.

III.

It is contended that vested property rights to lands and moneys of the Chickasaw nation, acquired through the judgments of the district court, will be destroyed or impaired, if this appeal shall not be dismissed. That is a mistake. The appellees have not, through that judgment, or otherwise, acquired, nor do they possess, any vested property rights in either lands, or moneys, of the Chickasaw nation. The lands, held in common by the Chickasaw and Choctaw nations, are the public property of those nations. The individual Chickasaws and Choctaws are not, as counsel asserts, tenants in common of those lands, nor do they hold those lands in any other form of individual ownership. Nor do the citizens of those nations hold, as individuals, the public moneys of the respective nations. The relation of the citizens of the Chickasaw and Choctaw nations to those lands and moneys, is, so far as this point is concerned, practically the same as the relation of the citizens of the United States to the public lands, and to the public moneys in the treasury of the

United States. All the citizens of the United States are equally interested in the public lands and moneys; but none of them hold any individual ownership therein. Those lands and moneys are public property of the nation,—not in any sense, nor for any purpose, private property of the citizens. Precisely the same thing is true of the relation of the citizens of the Chickasaw and Choctaw nations to the lands and moneys of those nations. That relation is easily ascertained. The Choctaw treaty of October 18, 1820, contains the following clause:

ART. 2. For and in consideration of the foregoing cession on the part of the Choctaw *nation*, and in part satisfaction for the same, the commissioners of the United States, in behalf of said states, do hereby cede to said *nation* a tract of country west of the Mississippi river, situate between the Arkansas and Red river, bounded as follows: &c.

The act of May 28, 1830, contains the following provision:

SEC. 3. *And be it further enacted*, That in the making of any such exchange, or exchanges, it shall and may be lawful for the president solemnly to assure the *tribe*, or *nation*, with which the exchange was made, that the United States will forever secure and guaranty to them and their heirs and successors the country so exchanged with them; and, if they prefer it, the United States will cause a patent, or grant, to be made and executed to them, for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.

The treaty of September 20, 1830, contains the following stipulation:

ART. 2. The United States, under a grant specially to be made by the president of the United States, shall cause to be conveyed to the Choctaw *nation* a tract of country, west of the Mississippi river, in fee simple to them and their decendants, to inure to them while they shall exist as a nation, and live on it, &c.

The patent granted by the president March 23, 1842, contains the following clause:

Know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw *nation*, the aforesaid tract of country, &c.

By the convention and agreement of January 17, 1837,

the Chickasaw *nation*, purchased from the Choctaw *nation*, a part of the land acquired from the United States, by the above-mentioned treaties and patent. The following is the stipulation:

Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district, within the limits of their country, *to be held on the same terms that the Choctaws now hold it*, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Choctaw nation; &c.

The tract sold to the Chickasaws was carved out of the middle portion of the Choctaw country. It contains 4,650,935 acres. There remained to the Choctaws a tract of 6,668,000 acres east of the "Chickasaw district," and a tract of 7,713,239 acres west of that district, these two Choctaw tracts amounting, in the aggregate, to 14,381,239 acres. The three tracts, amounted, in the aggregate to 19,032,174 acres. The Chickasaw tract was sold to the Chickasaw *nation*, not, as private property, by individual Choctaws, but, as public property, by the Choctaw nation. The effect of the sale was to make the Chickasaw nation the owner of the land sold.

In 1855, the authorities of the United States found it desirable to obtain a lease of the Choctaw tract of 7,713,239 acres, west of the Chickasaw district, for the settlement of certain tribes of friendly Indians. But the lease of that tract would leave to the Choctaw nation only the tract east of the Chickasaw district. The result would be that, although the population of the Choctaw nation bore to the population of the Chickasaw nation the proportion of 3 to 1, and the proportion of the Choctaw to the Chickasaw land, before the lease of 1855, was that of $14\frac{38}{100}$ to $4\frac{65}{100}$, or approximately 3 to 1, the lease of the western tract would leave the proportion of the Choctaw to the Chickasaw land that of 3 to 2. To ob-

viate this manifest injustice, by securing to the Choctaw nation its due proportion, of 3 to 1, in the lands not leased, the treaty of June 22, 1855, transformed the separate ownership of the two nations, in the three tracts, into ownership in common, and leased the western tract to the United States. The following is the language of the treaty of 1855:

> And, pursuant to an act of congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole: Provided, however, no part thereof shall ever be sold, without the consent of both tribes; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

The result of these arrangements was to make the two nations owners in common of their whole territory, in the proportion which the population of one bore to that of the other.

The interests of Chickasaw citizens, in these lands, are widely different from the rights of tenants in common, in their lands. The tenant in common can convey, mortgage or devise his property rights in the land. The Chickasaw can do neither of these things. The tenant in common can have partition; the Chickasaw cannot. At the death of the tenant in common, leaving children, his estate does not escheat; it descends. At the death of the Chickasaw, leaving, or not leaving children, his interest in the lands of the nation does not descend; it merges in the common stock and escheats. It is, in this respect, like the estate of the citizen of the United States in the public lands. A deed executed by all the tenants in common, conveys their land. A deed of Chickasaw land executed by every Chickasaw, conveys nothing. If a tenant in common dies, leaving, say, five children, the interests of the five children are not, in the aggregate, five times the father's; they are

only equal to the father's. But if a Chickasaw has five children, their interests, whether he lives or dies, are, in the aggregate, five times as large as his own.

The contention that the act of congress, authorizing these appeals, destroys, or impairs, vested rights of citizens *by blood*, is based upon the following paragraph of article 1 of the treaty of June 22, 1855:

> And pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guaranty the lands, embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole.

The claim that the law, authorizing these appeals, disturbs vested rights of citizens *by marriage* or *adoption*, is based upon the same stipulation, coupled with article 38 of the treaty of April 28, 1866, of which the following is the text:

> Every white person who, having married a Choctaw or Chickasaw resides in said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation and shall be subject to the laws of the Chickasaw and Choctaw nation, according to his domicile, and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw.

The case of citizens by blood is to be considered first. If these words, "so that every member of either tribe shall have an equal undivided interest in the whole," were applied to persons who, under treaties, constitutions, or laws, were permitted to convey, mortgage and devise their estates in lands,—whose children could take their lands by inheritance, but, during the life of the father, acquired no vested interest in lands held by him as tenant in common,—in that case these words, if disconnected with other treaty stipulations and unexplained by the context, might be construed to imply that such persons were to be invested with rights of private property in the land. But,

inasmuch as they are in fact applied to persons who cannot transfer, mortgage, or devise, whose children cannot take by inheritance, but become, at birth, each invested with interests, equal to that of the father, not because they are heirs of their father, but because they are constituent units in the body politic, these words aptly qualify interests not in private but in public property.

The words "each and every citizen of the United States shall have an equal undivided interest in the whole of the public lands," would accurately characterize the relation of citizens of the United States to those lands. The words of the treaty mean that the Chickasaw holds his "interest," as an interest, not in private, but in public property,—not in his private capacity, but in his political capacity, as a part of the body politic. They mean that the two nations, made up of the aggregate of their respective members, are to hold the lands of both nations in common, but in shares proportionate to the numbers of their citizens, respectively.

The treaty of 1855, on which the appellees base their contention that the individual Chickasaws have vested rights of property in Choctaw and Chickasaw lands, was made between the United States and the Choctaw and Chickasaw nations. These nations were capable of making treaties. As we have seen, they have made many treaties with the United States. They were competent to sell and purchase lands. They had, as nations, sold lands east of the Mississippi to the United States, and purchased land west of the Mississippi from the United States. The Choctaw nation had sold an undivided interest in its lands to the Chickasaw nation. It is to-day in the power of those nations, acting in their corporate capacity, to sell their country to the United States. They can transfer, not only dominion over, but property in,

this land. In so doing they will not take private property and dispose of it for public use, but will sell public property. To land in such a condition, the individual Chickasaw can have no vested right excluding the power of congress to authorize appeals in these citizenship cases.

But is it contended that the Chickasaw has a vested right to the *use* of a separate portion of the common domain of the Chickasaw and Choctaw nations, and that, in this respect, his interest, in that common domain, differs from the interest of the citizen of the United States, in the public lands of the nation? An analysis of the Chickasaw's interest will show that there is no difference which can affect the issues involved in the pending motion. The Choctaws and Chickasaws, together, number 20,000. They own more than 10,000,000 acres of land, exclusive of the leased district. An equal division in severalty would secure to each Chickasaw and Choctaw more than 500 acres. But if any member of either tribe should undertake to segregate a tract of 500 acres from the common stock, and appropriate it to his own *use*, he would undertake to appropriate to his own use that to which 19,999 others have rights identical with his own. Such an undertaking would resemble an undertaking, by a citizen of the United States, to secure the separate use of a part of the public lands. The treaty of 1855 does not secure to the individual Chickasaw the exclusive use of any separate parcel of the land of the Chickasaw and Choctaw nations. Their rights to such use are practically "squatter's rights," regulated, in a rude way, by statute. It is true that individual Chickasaws do enjoy the exclusive use of separate tracts. But there is no equality of use; some hold thousands of acres, others hold each less than a score.

While the individual Chickasaw has no treaty right to

the use of any specific tract of the common domain, he has a treaty right to his share of the net usufruct of the entire territory of the two nations. But this is precisely the right, which the citizen of the United States holds in relation to the public lands. In either case, the benefit comes not directly to the citizen, but to the nation, and, through the nation, to the citizen as a part of the body politic.

A judicial determination that a person is a citizen of the Chickasaw nation, or a citizen of the United States, does not make his citizenship a vested property right in the public lands, or carry, with it, a vested property right, such as to exclude the power of congress to authorize an appeal, after a judicial determination of a party's citizenship, on the ground that such an appeal would *disturb vested property rights in the public lands.*

The law conferred upon the district judge no power to vest any property rights in anybody. It purported to authorize him to decide who were citizens; but it did not purport to authorize him to decide what rights the citizen possessed, and, thereby, vest in him those rights. There are three classes of Chickasaw citizens—citizens by blood, citizens by marriage, and citizens by adoption. The law purported to empower the judge to find, as he did find, that the appellees in this case were citizens by marriage. But it did not authorize him to decide that the rights of the intermarried citizen were the same as those of the citizen by blood, and, by such decision, vest in the intermarried citizen all the property rights of the citizen by blood. Having found that the appellees were *citizens by marriage*, he proceeded to decree that they were *citizens*, and thereupon accorded to them "all the rights and privileges appertaining to such relation," meaning all the rights and privileges of citizens by blood. His decision that

these persons had this or that property right was a nullity. It vested no property right in either of the appellees. Their status, so far as vested property rights are concerned, is fixed, not by Judge Townsend's decision,—nor by his construction of the treaties and laws,—but by the treaties and laws themselves. That the treaties and laws vest in neither of them any property rights whatever I have endeavored to show, in my brief on the merits of the citizenship cases.

IV.

Another ground for the motion to dismiss the appeal is stated as follows:

> Our contention is that, if the law of 1898 is valid for any purpose, and could apply to judgments rendered prior to its passage, in any way, it only authorized appeals to the supreme court in cases *involving the constitutionality of any legislation affecting citizenship or the allotment of lands in the Indian Territory*, in the language of the act itself. * *
>
> The act of March 3d, 1891, establishing the circuit court of appeals and regulating and defining, in certain cases, the jurisdiction of the courts of the United States, provides in section five (5) that appeals, or writs of error, may be taken from the existing district and circuit courts direct to the supreme court in the following cases among others:
>
> "In any case in which the jurisdiction is in issue. In such cases the question of jurisdiction alone should be certified to the supreme court, from the court below, for decision."
>
> Also, "In any case in which the constitutionality of any law of the United States is drawn in question."
>
> Hence, we are of opinion that if the act of 1898 only authorized appeals, to this court, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, and that question being raised in this record as one affecting the jurisdiction of the court, that the appeal should be taken and perfected in accordance with the first clause of section five (5) of the act of the 3d of March, 1891, above referred to; and the very question of jurisdiction should alone have been certified to the supreme court. And that not being done, the appeal should be dismissed on motion.

The counsel has evidently misunderstood the import of the act of July 1, 1898, authorizing appeals, from the courts in the Indian Territory, to the supreme court. The following is the provision of the act:

> Appeals shall be allowed, from the United States courts in the Indian Territory, direct to the supreme court of the United States, to either

party, *in all citizenship cases*, and in all cases, between either of the Five Civilized Tribes and the United States, involving the constitutionality, or validity, of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases.

Appeals are allowed in all citizenship cases, without exception, or limitation. In cases between the United States and either one of the Five Civilized Tribes, appeals are allowed only when the cases involve questions respecting the constitutionality or validity of legislation affecting citizenship, or the allotment of lands, in the Indian Territory. All this is clearly apparent on the face of the statute, which is punctuated precisely as is the foregoing quotation. But then if appeals, in citizenship cases, are only to be taken when those cases involve questions respecting the validity, or constitutionality, of legislation affecting citizenship, or the allotment of lands, in the Indian Territory, the provision is absurdly narrow in scope; for the questions, involved in more than nine-tenths of these citizenship cases, are questions of fact, and of the construction of treaties, constitutions and laws.

Moreover, the reason for the provision that appeals shall be allowed "in all cases between either of the Five Civilized Tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory," is to be found in the words of the acts conferring jurisdiction of such cases upon the lower courts.

The act of June 28, 1898, contains the following provision:

Sec. 2. That when, in the progress of any civil suit, either in law or equity, pending in the United States court, in any district in said territory, it shall appear to the court that the property of any tribe is, in any way, affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit, by service upon the chief, or governor, of said tribe; and the suit shall be thereafter conducted as if said tribe had been an original party to said action.

The district court in the Chickasaw nation has jurisdiction "of all suits at common law, where the United States are plaintiffs," and of all suits in equity, where the matter in dispute equals, in value, the amount prescribed, and the United States are petitioners. Rev. Stat. 563, 629; 26 Stat. 81, sec. 29. Such suits may, or may not, affect the property, real or personal, of the Chickasaw nation. They may, or may not, affect Chickasaw citizenship. When the suit does affect Chickasaw property, the Chickasaw nation becomes a party to a suit in which "the United States are plaintiffs." But such suits, although affecting, in some way, the tribal property, may not involve any question as to the constitutionality, or validity, of legislation affecting citizenship, or the allotment of lands. For obvious reasons, it was the purpose of Congress to authorize no appeals in any such cases, except those which, not only affected property of the tribe, but also, at the same time, involved questions respecting the constitutionality, or validity, of legislation affecting citizenship, or the allotment of lands.

The counsel is equally mistaken as to the effect of the words "under the rules and regulations governing appeals to said court in other cases," when coupled with section 5 of the court of appeals act of March 3, 1891, of which the following is a copy:

Sec. 5. That appeals, or writs of error, may be taken from the district courts, or from the existing circuit courts, direct to the supreme court, in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court, from the court below, for decision.

From the final sentences and decrees in prize cases.

In cases of conviction of a capital or otherwise infamous crime.

In any case, that involves the construction, or application, of the constitution of the United States.

In any case, in which the constitutionality of any law of the United States, or the validity, or construction of any treaty, made under its authority, is drawn in question.

In any case, in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

The reason for the requirement that, in the first of these six classes of cases, the question of jurisdiction alone shall be certified to the supreme court is this: That class includes cases involving federal questions, other than those defined in the next five classes, in addition to the jurisdictional question. But congress did not propose to permit any questions, not specified in the other five classes, to be smuggled into the supreme court, under cover of the jurisdictional question; and therefore, by the language of the clause, withheld such questions from the appellate jurisdiction of that court. It was not the intention of congress to restrict the appellate jurisdiction of the supreme court to the single question of jurisdiction, to the exclusion of the questions expressly made appealable by the five succeeding clauses.

But then if congress, after expressly vesting in the supreme court appellate jurisdiction of the other five classes of cases, had provided that, in those five classes, the jurisdictional question, when involved, should alone be certified, on appeal, that provision would not have divested the supreme court of its appellate jurisdiction, or justified a dismissal of the appeal, in case of the certification of the other questions. The provision would have been merely directory.

V.

The reasoning of the appellees, in denial of the competency of congress to authorize these appeals, is based largely upon the alleged hardships to result from the destruction of *long* vested rights, the infraction of *long* established rules of property, and the disturbance of *long* set-

tled relations and conditions. But all this reasoning *ab inconvenienti* fails in this case, because there was no semblance of antiquity about these judgments, when the law authorizing the appeals was enacted. It was enacted by the first congress that met after the judgments were rendered, disclosing the gravity of the wrongs which would result from their enforcement. Indeed the counsel himself says elsewhere in his brief, that the appellees, who commenced the erection of houses on lands claimed under these judgments, had not time to complete them, before congress authorized the appeals.

If the rules of unwritten law, applicable to these cases, based upon principle, or authority, do not require the court to hold that congress was competent to authorize the appeals, certainly there is no such rule constraining the court to make a contrary decision. It is clear that no conclusion can be reached more unfavorable to the appellant than this, that the court is free to render such a decision of the question as justice shall appear to demand, in these particular cases. It will not be difficult, I think, to convince the court that justice imperatively demands the affirmance of the power of congress to authorize these appeals unless the judgments themselves are void for want of jurisdiction. To that end, I will refer to the records, in a few of the sixty-eight Chickasaw appeals.

In the particular case now under consideration, Richard C. Wiggs married Georgia M. Allen, a Chickasaw. After her death, he married Josie Lawson, a white woman; and a white child, Mary Edna Wiggs, was born of this second marriage. Judge Townsend decreed as follows:

It is therefore considered ordered and decreed that the said Richard C. Wiggs and his wife, the said Josie Wiggs, and their daughter, the said

Mary Edna Wiggs, be and they are hereby admitted to citizenship in the Chickasaw nation, and to enrollment as members of the tribe of Chickasaw Indians, with all the rights and privileges appertaining to such relation.

In No. 473 the district judge decided that, by virtue of the first article of the treaty of 1855, and the thirty-eighth article of the treaty of 1866, the white man A, who married a Chickasaw woman B, became at once invested with Chickasaw citizenship, not merely for jurisdictional purposes, but to all intents and purposes, and therefore acquired all the rights and privileges appertaining to Chickasaw citizenship. He decided, also, that if A, after the death of his Chickasaw wife B, married a white woman C, and white children were born of this second marriage, the white wife C and her white children all became Chickasaw citizens, holding the same vested rights. And he decided, further, that if, after the death of the white husband A, his white widow C married a second white husband D, and white children were born of this third marriage, the white man D and all his children acquired the same vested rights. And finally he decided that if the white children of these several marriages themselves married white persons, those white persons and their white children all acquired the same vested rights. In accordance with these decisions he held, in twenty-six of the pending cases, that seventy-five white persons, who were husbands of white wives, wives of white husbands, or children of white parents, were Chickasaw citizens, and that twenty-six white men, who had been husbands of Chickasaw women, but, after their Chickasaw wives had died or been divorced, had married white women, were entitled to citizenship and acquired the same vested rights. By this ingenious process of devolution one hundred and one names were added to the roll of Chickasaw citizens.

In my brief, herewith filed, relating to the general

questions involved in these citizenship cases, I have attempted to show that not one of those persons was entitled to enrollment.

By an act of the Chickasaw legislature, passed in 1856, "the right of citizenship" was granted to five white girls. The constitution, then in force, prohibited the legislature from granting any right of citizenship "further than" the right "to settle and remain in the nation and to be subject to its laws." The act was repealed in 1857, but was afterwards, by mistake, printed in compilations of the Chickasaw laws. The testimony of Judge Overton Love, on this subject, in No. 486, will be found to be "interesting reading." The district court, overruling the Dawes Commission, has, in Nos. 469, 477 and 486, enrolled, as citizens entitled to all the rights and privileges of Chickasaw citizenship, thirty-two white persons, descendants of those white girls, and husbands, or wives, of their descendants.

In the single case of The Chickasaw Nation, Appellant, *v.* Wm. Burch *et al.*, No. 517, eighty-three persons, apparently without the slightest trace of Indian blood, applied to the Dawes Commission for enrollment as citizens of the Chickasaw nation. Some of them claimed enrollment on the ground that they were descendants of a woman alleged to have been a Chickasaw, and to have lived in the state of Mississippi, near the close of the eighteenth century. The others claimed as husbands, or wives, of her descendants. The evidence produced, in maintenance of their claims, largely hearsay, was too nebulous and flimsy to warrant a judgment even in Solon Shingle's "first-class cow case;" and they were all rejected by the Dawes Commission. But the district judge reversed the decision of that Commission, and adjudged them all to be citizens, adding eighty-three names to the roll of those entitled to share in the lands of the Choctaws and Chickasaws.

In No. 472, the clerk, acting as master, reported as follows:

> John Calvin Hill is a brother of Evans Hill, and a lineal descendant of Charles Matlock, a Chickasaw Indian, who lived and died in the state of Tennessee. While Charlie Matlock was a Chickasaw Indian, there is no proof to show that he, or his descendants, with the exception of Evans Hill a brother of the applicant, had any connection with the Chickasaw tribe of Indians. John B. Hill many years ago emigrated from the state of Tennessee to the state of Texas, where he now resides. Both he and his prolific family are citizens of the United States; that they vote and exercise all other rights of citizenship of the United States, and have their domicile in the state of Texas. Under the law, as I believe it to be, if they had resided in the Indian Territory and asserted their rights to citizenship, they would have been, according to the technical rule, and no other, entitled to enrollment. But they are resident citizens of Texas, and have property and homes in the state, and, according to the fair rules of justice, they are no more entitled to citizenship.

The case was subsequently referred to a different master, who reported that Charlie Matlock was a "quarter breed Chickasaw," and that none of the applicants ever resided in the Indian Territory before they filed their applications. The Dawes Commission had rejected them all; but the district judge enrolled fifty-four, some as descendants of Matlock, and the others as husbands or wives of his descendants.

In No. 476 the master reports that "the proof of the applicants amounts to little more, if any, than a mere family tradition of Indian blood." He recommended the rejection of all the applicants. They had all been rejected by the Dawes Commission. But the case was referred to another master, who reported as follows:

> I am of opinion, from the testimony of Simson and Wolfe, and from the testimony of the family tradition, that all the applicants herein are the legal descendants of the said Nancy Frazier, who was a Chickasaw Indian, except the said Elizabeth McDuffie, S. M. Crawford, George Jarvis, and Wm. M. McCartey, who are intermarried citizens, and that they are each and all of them entitled to enrolment.

Accordingly the district judge enrolled twenty-one as descendants of Nancy Frazier, and four as husbands or wives of her descendants.

In No. 520, the master reported as follows:

It appears, from the evidence in the case, that the applicants are the descendants of Elizabeth Colbert, a Chickasaw Indian by blood, who married a man by the name of George Stewart; that the said George Stewart and Elizabeth Colbert had a daughter, by the name of Elizabeth Stewart, through whom these applicants claim; that said Elizabeth Stewart married a white man by the name of Bledsoe Holder; that said Bledsoe Holder and Elizabeth Stewart had a number of children, among them being Wm. L. Holder, Jackson A. Holder, and Burton A. Holder; that the said Bledsoe Holder and wife lived in the old Chickasaw reservation, in the state of Mississippi, and left the state of Mississippi, with the other Indians, en route to the Indian Territory, but that they stopped, with their children, in southwest Missouri, and remained there about twenty years; that they afterwards came into the Indian Territory, and finally drifted to the northern border of Texas and remained there a number of years. It appears, from the evidence, that the said Bledsoe Holder and Elizabeth Holder and their descendants, who are concerned in this application, at all times claimed to be citizens of the Chickasaw nation, and that they lived in, and about, the Chickasaw nation, from time to time, ever since they came west of the Mississippi river, and that they in fact have Chickasaw blood in their veins.

The judge thereupon added ninety-nine to the roll of Chickasaw citizens, all of whom had been rejected by the Dawes Commission.

HALBERT E. PAINE,
Atty. for Chickasaw Nation.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 496.

THE UNITED STATES, Appellant,

vs.

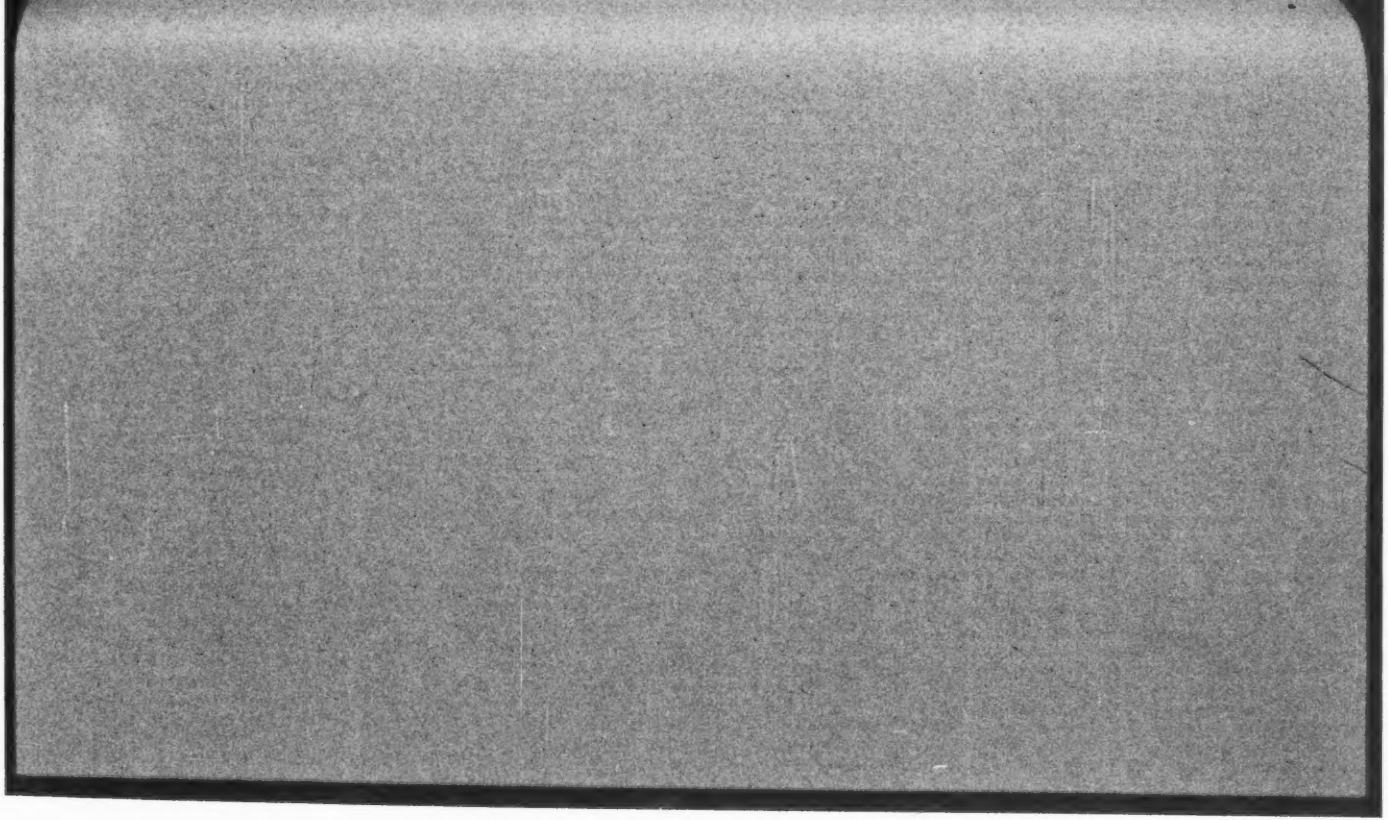
RICHARD C. WIGGS et al.

Appeal from District Court in Chickasaw Nation.

BRIEF FOR APPELLANT.

HALBERT E. PAINE,
Attorney for Chickasaw Nation.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.



Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 496.

THE UNITED STATES, APPELLANT,

v.

RICHARD C. WIGGS ET AL.

Appeal from the District Court in the Chickasaw Nation.

BRIEF FOR APPELLANT.

HALBERT E. PAINE,
Atty. for Chickasaw Nation.

The enactment of the legislation, which disclosed a purpose, on the part of congress, to secure the allotment, in severalty, of the lands of the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles, occasioned a very remarkable migratory movement, among the people of the southwestern states. Applications for admission to the rolls of citizens came pouring in, by thousands, from Texas, Arkansas, Louisiana, Mississippi, Alabama, and Georgia. Men, women, and children who had never set foot, or thought of setting foot, in the Indian Territory,

whose ancestors had never seen or cared to see that country, jostled each other, in the mad rush for shares in the fertile lands of these Indian nations.

From every quarter came white men, who claimed to be husbands of white women who had previously been wives of Chickasaws, and white women who claimed to be wives of white men who had previously been husbands of Chickasaw women, and men, women, and children who claimed to be descendants of white men or white women who had once been the husbands or wives of Chickasaws, all importunately demanding to be enrolled as citizens of the Chickasaw nation.

It was no paltry prize that excited the cupidity and stimulated the zeal of these adventurers. The Choctaws and Chickasaws together number 20,000, and they possess more than 10,000,000 acres of land, not surpassed, in fertility, by any land of equal area on this continent. Each man, woman, and child, who is invested with all the rights and privileges of either Choctaw, or Chickasaw citizenship, will be entitled, when an allotment, in severalty, is made, to five hundred acres, worth from five dollars to ten dollars per acre. Four thousand claimants, wrongfully foisted upon the Chickasaw and Choctaw rolls, will rob the Choctaws and Chickasaws of 2,000,000 acres of land worth from $10,000,000 to $20,000,000. The Chickasaws and Choctaws, therefore, have legitimate and very urgent reasons for resisting the unlawful enrollment of applicants for citizenship.

The object of most, if not all, of these applicants for Chickasaw enrollment, who have never resided in the Chickasaw nation, or have abandoned the nation, but claim to have Chickasaw blood, is to obtain an allotment of Chickasaw and Choctaw lands and of Chickasaw moneys. Chickasaw citizenship would be valueless to

them, without these property rights. And the real question, in all these Chickasaw cases, is whether the claimants are entitled to allotments of shares in the lands and moneys of the Chickasaws. The judgments of the Commission to the Five Civilized Tribes were reversed, in sixty-seven of the cases, by the district judge, who referred them to masters, for report, and confirmed their reports, in all cases in which their decisions were adverse to the Chickasaws.

The district judge delivered an opinion, in which, after commenting upon certain Choctaw and Chickasaw treaties, he announced the principles upon which his judgments in those cases would be based. His opinion is printed in the record of each of the cases. The following is the closing parapraph:

> Along the lines herein indicated the citizenship cases, pending in this court, will be disposed of.

In conformity with this opinion he has, in different cases, decided,

First. That all persons having Chickasaw blood are citizens of the Chickasaw nation, whether residents, or not residents, of that nation.

Second. That citizens by marriage can not be deprived of, or forfeit, their citizenship, while residing in the nation.

Third. That an intermarried white man, who, after the death of his Chickasaw wife, marries a white woman, thereby confers Chickasaw citizenship upon the white wife; and if, after his death, his white widow marries a white man, she confers Chickasaw citizenship on him; and if, upon her death, her surviving white husband marries another white wife he confers Chickasaw citizenship on her; and has also decided that the white children of these several marriages are Chickasaw citizens, and

confer Chickasaw citizenship upon their white husbands and wives.

I.

Citizens by Blood.

In his opinion the district judge said:

> I shall hold that non-resident Choctaws and Chickasaws, who have properly filed their applications, and established their membership of the tribes, shall be admitted to the roll as citizens.

What the judge meant, as shown by the context, was this, that he would hold that non-residents of the Choctaw and Chickasaw nations, who had properly filed their applications, and proven their Choctaw or Chickasaw blood, were to be admitted to the roll as citizens. He based the conclusion which he had reached upon three grounds, as follows:

> 1. In all these various treaties, solemnly entered into, there is not one line or word to indicate that the Choctaws and Chickasaws, who did not remove to the western country, were not Choctaw or Chickasaw citizens and members of their respective tribes.
> 2. In the treaty of 1830, between the Choctaws and the United States, it is expressly provided that those who remained should "not lose the privilege of a Choctaw citizen, but, if they ever remove, are not to be entitled to any portion of the Choctaw annuity."
> 3. When it was supposed that the lands would be allotted in severalty, under the treaty of 1866, it was expressly provided that notice should be published in the papers of several states, that absent Choctaws and Chickasaws might come in and obtain the benefit of the allotments; and absentees were to be allowed five years to occupy and commence improvements, and all that was necessary was to satisfy the register of the land office that that was their intention. The allotment did not take place; but if they had not come in, they were only to lose their allotment of land; it did not make them any the less Choctaws, or Chickasaws, or members of the Choctaw and Chickasaw tribes.

If it is true that in the treaties prior to that of 1830, "there is not one line or word to indicate that the Choctaws and Chickasaws, who did not remove to the western country, *were not* to continue to be citizens of the Choctaw and Chickasaw nations," it is equally true that these

treaties contained nothing to indicate that those who remained in Mississippi *were* to continue to be citizens of their respective nations. On this precise point those treaties are absolutely silent. There is nothing in the language, nature, object, scope, or circumstances of the treaties warranting any *legitimate inference* therefrom that those who remained in Mississippi were to continue to be citizens. That this inference is not warranted by any principle of justice, or of public law, or of public policy, or by the general spirit and intent of the treaties, will appear from considerations hereafter to be suggested to the court.

The second ground, on which the district judge bases his decisions, is the stipulation at the close of article 14 of the Choctaw treaty of September 27, 1830. As stated by the judge, this stipulation was, that, upon the emigration of the Choctaw nation, all "those who remained should not lose the privilege of a Choctaw citizen." But such was not the tenor of the stipulation. In order to make its meaning clear, I present the entire article.

Article XIV. Each Choctaw head of a family being desirous to *remain and become a citizen of the states* shall be permitted to do so, by signifying his intention to the agent, within six months from the ratification of this treaty; and he or she shall, thereupon, be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age; and a quarter-section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the states, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. *Persons who claim under this article shall not lose the privilege of a Choctaw citizen*, but, if they ever remove, are not to be entitled to any portion of the Choctaw annuity.

Now the last clause did not secure, or purport to secure, a continuance of "the privilege of a Choctaw citizen" to all Choctaws who remained in Mississippi, after the emigration of the tribe, but only to such as *claimed under this*

article. The only persons who were permitted to "claim under this article," were the heads of families and their unmarried children living with them. To no others was this guaranty against loss of this privilege extended. And even heads of families could not avail themselves of it otherwise than by making "claim under this article." No provision whatever was made for claims by unmarried adults, who did not live with their parents, or for unmarried children, who did not live with their parents, or for orphans, who were not heads of families.

Again, the continuance of "the privilege of a Choctaw citizen" was only promised to heads of families and their unmarried children living with them, in case they intended to become citizens of the states, and signified such intention to the agent within six months after the ratification of the treaty. Moreover, this "privilege of a Choctaw citizen," conditionally promised to heads of families and their unmarried children, was to terminate when they became citizens of the states, at, or before, the expiration of five years after the ratification of the treaty. The treaty was ratified February 24, 1831. "The privilege of a Choctaw citizen" conferred upon heads of families and their unmarried children living with them, if they remained in Mississippi, expired in 1836—sixty-two years ago.

The presence of the stipulation that "persons who claim under this article shall not lose the privilege of a Choctaw citizen" does not, I submit, prove, or tend to prove, that, in the absence of such a stipulation, either the tribal polity of the Choctaws, or public law applicable to the case (to say nothing of other relevant treaty stipulations), would have secured a continuance of "the privilege of a Choctaw citizen" for five years, even to the "persons who claimed" under article 14 of the treaty. On the contrary, the fact that it was deemed necessary

to insert this stipulation in the treaty, in order to continue the privilege, even to the class provided for, shows that, in the absence of such a stipulation, the tribal polity of the Choctaws would not have continued that privilege.

The Choctaw heads of families and their unmarried children living with them, having claimed under article 14 of the treaty, retained the "privilege of a Choctaw citizen," until they became citizens of the States,—in no event longer than five years after the ratification of the treaty. But the continuance of this privilege was secured to them by the last clause of article 14, and by *nothing else*. The scope and efficacy of that provision were restricted to the identical class of persons, who claimed under that article. It did not apply to heads of families, who remained in Mississippi after the emigration, but made no claim under article 14, or to their families. It did not apply to unmarried adults who did not live with their parents, or to unmarried children who did not live with their parents, or to unmarried orphans. It did not apply to Choctaws who had been born and always resided in Louisiana, or Texas, or Arkansas, or elsewhere outside the state of Mississippi. It did not apply to Choctaws born twenty, thirty, forty, fifty, or sixty years after the date of the treaty.

But the district judge disregarded this restriction. He concluded, not merely that heads of families and their unmarried children living with them, claiming under article 14 of the treaty, continued to be citizens of the Choctaw nation, but that all persons, who had Choctaw blood in their veins, whether living in 1830, or born fifty or sixty years after 1830, whether living in the Choctaw nation, or in the state of Mississippi, or elsewhere, were Choctaw citizens,—that is to say, he decided, in effect,

that persons of Choctaw blood, who were born and had always resided in Louisiana, or Texas, or Arkansas, and had never visited the Choctaw nation, were, nevertheless, Choctaw citizens. Moreover, he so expanded this conclusion as to embrace, in its scope, the Chickasaws, to whom it is quite as inapplicable as to the Mohawks or Modocs. I respectfully submit that article 14 of the treaty affords no support to such a conclusion.

But what was this "privilege of a Choctaw citizen," which was secured to certain Choctaws claiming under article 14 of the treaty of 1830? It is for the appellees to show what it was. This privilege was not defined in that treaty or in any prior treaty. In 1830 the Choctaws had no written constitution or laws. It will not be easy for the appellees to extract from vague tradition an accurate description of this privilege. But that is not material; for, whatever else it was, it was not the privilege of holding, as a private individual, the title of a tenant in common of the territory occupied by the Choctaws, which in 1820 included 12,965,000 acres of land in the state of Mississippi. It is certain that the Choctaws, as individuals, held no vested property rights in those lands. It is certain that their interest therein was not so near to private property as is the interest of citizens of the United States in the public lands.

This privilege, whatever it was, was not promised to any Chickasaw whatever. At that time there was no political connection between the Choctaws and Chickasaws. Their lands were contiguous, but were not held in common. It is certain that few and probable that none of the Choctaws, who claimed under the treaty of 1830, sixty-nine years ago, are included among the thousands of applicants for *Choctaw* citizenship, who have besieged the Dawes Commission and the district court. Of course

none of them could, under any pretext, claim *Chickasaw* citizenship. The district judge is of the opinion that this conditional promise of an undefined privilege, made to a specified class of Choctaws, living in 1830 and making a certain claim under the treaty of that year, secured to thousands of Chickasaws as well as Choctaws born forty, fifty, or sixty year afterwards, the right to allotments of equal shares in the Choctaw and Chickasaw lands. This theory supposes a disproportion between cause and effect, which is marvellous if not miraculous.

The district judge seems to be equally mistaken in his opinion as to the effect of the conditional stipulation, contained in the treaty of 1866, which furnished the third ground of his decision. In article 12 of that treaty it was agreed, that, if the legislatures of the Choctaw and Chickasaw nations should decide to allot their lands in severalty, (which, by the way, they refused to do), certain public notices should be given; and thereafter the Choctaws and Chickasaws should be permitted to select each one quarter section of land, to be held in severalty. In the next article it was provided as follows:

> Article XIII. The notice, required in the above article, shall be given, not only in the Choctaw and Chickasaw nations, but by publication in newspapers printed in the states of Mississippi and Tennessee, Louisiana, Texas, Arkansas, and Alabama, to the end that such Choctaws and Chickasaws, as yet remain outside of the Choctaw and Chickasaw nations, may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws; provided that, before any such absent Choctaw or Chickasaw shall be permitted to select for him or herself, or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become *bona fide* residents in the said nation, within five years from the time of selection, and should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled, and the land thereafter shall be discharged from all claim on account thereof.

This stipulation does not purport to *recognize existing rights* of these absentees. It purports to *confer upon*

them certain rights, provided the Choctaw and Chickasaw legislatures should decide to do, what they, in fact, refused to do, viz: allot their lands in severalty. Upon that condition it purports to confer upon non-resident Choctaws and Chickasaws certain rights, which, by article 15 of the same treaty, were conferred upon resident Choctaws and Chickasaws. Instead of warranting an inference that the tribal systems, or polity, of the Choctaws and Chickasaws, secured the rights of cittzenship to absentees, it obviously necessitates the contrary inference. The circumstance that it was found necessary, in order to secure these rights to absentees, to make special provision therefor, implies that, in the absence of such special provision, absentees would not be included in a general provision for Choctaws or Chickasaws.

But then the right, which was conferred on the absentees, upon a condition which the Choctaw and Chickasaw legislatures refused to perform, was not the right of *citizenship*, but only the right to *select* 160 *acres of land*. By the agreement of 1898, the right to select forty acres of land in the Chickasaw nation was granted to each Chickasaw freedman. But no freedman was made a Chickasaw citizen, by the grant of this right. Moreover the right secured by article 13, such as it was, could only have been enjoyed, upon the performance of certain conditions, within a period not greatly exceeding five years from 1866. It would have expired more than a quarter of a century ago. No Choctaw or Chickasaw, who was absent from his nation in 1866, and failed to become a bona fide resident therein a quarter of a century ago, could have acquired 160 acres of land, (to say nothing of citizenship) by virtue of this treaty stipulation, even if the Choctaw and Chickasaw legislatures had decided to allot their lands in severalty.

The provision requiring these absentees to become *bona fide* residents of their respective nations is, in spirit and effect, adverse to the contention that Choctaw or Chickasaw blood constitutes an unassailable title to Choctaw or Chickasaw citizenship, without regard to residence. But finally back of all this is the fact that the legislatures of the Choctaw and Chickasaw nations refused to make the proposed allotments in severalty, and, therefore, the rights in question never vested, either in residents, or in non-residents.

I submit that the reasoning of the district judge does not warrant his decision that Choctaw or Chickasaw blood, irrespective of residence, secures a perfect title to Choctaw or Chickasaw citizenship. I now beg the attention of the court to the considerations which seem to me affirmatively to show that the conclusion of the judge, on this question, was altogether erroneous.

Upon the non-resident claimants of Chickasaw citizenship rests the burden of proving that residence, which is an inseparable qualification of citizenship in the American nation, and in the several states and territories, is not an inseparable qualification of citizenship in the Chickasaw nation. Upon them rests the burden of indicating such differences in constitutions, laws, usages, or political systems, as will occasion this alleged difference in the qualifications of citizens. It is not provided, in any treaty, or in the Chickasaw constitution, or in any Chickasaw law, or in any law of the United States, that Chickasaw blood shall entitle a claimant to Chickasaw citizenship, without residence in the Chickasaw nation. In the absence of such a provision, there is no better reason for holding that a man with Chickasaw blood, who has never resided in the Chickasaw nation, or has abandoned the nation, is a Chickasaw citizen, than for holding that a man

with Virginia blood, who has never resided in Virginia, or has abandoned that state, is a citizen of Virginia.

As to some of the qualifications for citizenship, the Chickasaw nation differs from the United States, and also from the several states and territories. For example, every person born in the United States, except representatives of foreign powers, becomes, at birth, a citizen of the United States, and also of the state in which he was born. But only a small proportion of the persons born in the Chickasaw nation become, at birth, citizens of that nation. Only those become citizens whose parents are citizens by birth, marriage, or adoption. The whites in the nation number more than 50,000, and the blacks more than 5,000, while the citizens by blood, marriage, and adoption, number less than 5,000.

Again, upon the marriage of a foreign woman to a citizen of the United States, she herself becomes a citizen; but a man, who is the subject of a foreign power, does not become a citizen of the United States, upon his marriage to a woman who is a citizen. But, in the Chickasaw nation, both white men and white women, who marry Chickasaws, become Chickasaw citizens. Moreover, while foreigners are naturalized in the United States, by the courts, in pursuance of legislative provisions; in the Chickasaw nation, they are only naturalized by the legislature, by specific acts of adoption.

And yet, in all these political communities,—in the United States, in the several states and territories, and in the Chickasaw nation, residence is one of the qualifications for citizenship. Although not the only qualification, it is, in all of them, an indispensable qualification. Chickasaw blood is not a perfect qualification for citizenship; nor is it even an indispensable qualification. Citizens by marriage, or adoption, have no Chickasaw blood.

On the other hand, residence, while not, in itself, a perfect qualification, is, nevertheless, a necessary qualification. As there can be no citizenship by blood, without residence, so can there be no citizenship by marriage, or adoption, without residence.

Blood is not conclusive of citizenship, in the European nations, in the American nation, in any of the states, or in the organized territories. If it is so in the Choctaw and Chickasaw nations, this condition must result either from some differences of polity, or from some specific and exceptional provisions of treaties, constitutions, or laws. A man born in a foreign country, and never a resident of the United States, in whose veins is no blood, save that of ancestors, who have resided in the United States since the coming of the Mayflower, has American blood; but he is not a citizen of the United States. Residence in the United States is an indispensable condition precedent to the acquisition of such citizenship. It is also an indispensable condition precedent to the acquisition of citizenship in any of the states, or territories.

A man whose paternal and maternal ancestors were, through many generations, native Virginians, whose father and mother removed to Kentucky, where he, himself was born, has Virginia blood; but, unless he removes to the state of Virginia, and in good faith makes that state his residence, he is not a citizen of Virginia. If, having been born in Virginia, he abandons that state, for a permanent residence in another, he ceases to be a citizen of Virginia. Chickasaw citizenship may be acquired and lost in the same way, except that only Chickasaws by blood, marriage, or adoption, can acquire Chickasaw citizenship; but any citizen of the United States, with or without Virginia blood, may acquire citizenship in Virginia.

Will it be asserted that the Chickasaw nation is a mere

ethnical community, and that, therefore, every person, having Chickasaw blood in his veins, is a member of the Chickasaw family, or race, wherever he may reside? This will be a mistake. It is probable that a majority of the citizens of the Choctaw nation have more or less Choctaw blood, and that a majority of the citizens of the Chickasaw nation have more or less Chickasaw blood. But a large part of the citizens of the Chickasaw nation, who have Chickasaw blood, have also Caucasian blood, and, so far as blood is concerned, are more nearly akin to the white than to the Indian race. The same thing is true of the Choctaw nation. Again many Chickasaw citizens are Choctaws by blood, and have no Chickasaw blood whatever. They have become Chickasaw citizens, by intermarriage with Chickasaws. And this is also true, *vice versa*, in the Choctaw nation. Moreover, in each nation large numbers of intermarried and adopted whites, and their descendants, are citizens. And then all the former slaves of the Choctaws and their descendants, though of African descent, are Choctaw citizens. The position that there is anything in the ethnical condition of the Choctaw, or Chickasaw, nation to distinguish it from one of our states or territories is, therefore, untenable.

Although the two tribes were formerly implacable foes, often at war with each other, yet for more than one hundred years they have been friends, as well as neighbors, and have now become as thoroughly intermingled as the Germans and Irish in the state of Wisconsin; and even their original very marked differences of physiognomy have almost entirely disappeared. The task of preparing separate rolls of the Chickasaw citizen of full blood, and of those of mixed Chickasaw and Choctaw blood, would prove an exceedingly difficult, if not an absolutely impos-

sible task. Whatever may have been true two hundred years ago, there is no ground for the contention that the Chickasaw nation is, at the present time, or has been, at any time within the last fifty years, a mere race,—a purely ethnical community. That nation is as thoroughly a political community,—a body politic,—as is the state of Virginia, or the Territory of Arizona.

But the theory that the Chickasaw nation is a mere family of one common lineage, and not a body politic, is swept away by the following provision of the treaty of 1855:

> Art. 5. The members of either the Choctaw or the Chickasaw tribes shall have the right freely to settle within the jurisdiction of the other, and shall, thereupon, be entitled to *all the rights, privileges, and immunities of citizens thereof;* but no member of either tribe shall be permitted to participate in the funds belonging to the other tribe.

By virtue of this stipulation, all Choctaws, while residing in the Chickasaw nation, are entitled to all the rights, privileges, and immunities of Chickasaw citizens, and are, to all intents and purposes, Chickasaw citizens. The only privilege excepted is the privilege of sharing in the Chickasaw funds. There is no exception, so far as the lands are concerned. The Choctaws number 15,000 and the Chickasaws 5,000. There are now in the Chickasaw nation large numbers of Choctaws, who enjoy all the rights, privileges, and immunities of Chickasaw citizens. The tendency of migration, between the Choctaws and Chickasaws, is from the Choctaws to the Chickasaws. If 5,000 Choctaws should, by residence in the Chickasaw nation, become Chickasaw citizens, there would be more Chickasaw citizens of Choctaw than of Chickasaw blood. The fact that this is a possibility is fatal to the contention that Chickasaw blood is conclusive of Chickasaw citizenship.

The theory that an admixture of Chickasaw blood con-

stitutes an unimpeachable title to Chickasaw citizenship, without regard to residence, or enrollment, is negatived by the following provision of section 21 of the act of June 28, 1898:

> No person shall be enrolled, who has not heretofore removed to and, in good faith, settled in the nation, in which he claims citizenship; *Provided, however*, That nothing contained in this act shall be so construed as to militate against any rights, or privileges, which the Mississippi Choctaws may have, under the laws of, or the treaties with, the United States.

The effect of this provision is that an applicant for enrollment may be a Chickasaw of the full blood, and yet, if he "has not heretofore removed to and in good faith settled in the nation," he can not be enrolled, and can not become a Chickasaw citizen.

This theory, as to the efficacy of Chickasaw blood, is also negatived by the following clause in the same section of the act of June 28, 1898:

> The rolls so made, when approved by the secretary of the interior, shall be final; and the persons, whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

Under this provision, the rolls prepared by the Dawes Commission and perfected, on appeal, by the supreme court, when finally approved by the secretary of the interior, contain the names of all the citizens of the Chickasaw nation, except citizens who thereafter become such by birth, adoption, or marriage. After the approval of the roll, by the secretary of the interior, applicants for enrollment can not become citizens of the Chickasaw nation. This is obviously fatal to the contention that Chickasaw blood constitutes an unassailable title to Chickasaw citizenship.

It has been held by the district judge, and is contended by all the applicants, who claim citizenship under article

38 of the treaty of 1866, that it is provided, in that article, that:

> Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation * * in all respects as though he was a native Choctaw or Chickasaw.

If this is the effect of the stipulation, native citizens and intermarried citizens are the same in all respects,—that is to say, their rights, qualifications and obligations as citizens are the same. But by this same article residence is made a necessary qualification of the intermarried citizen. It is therefore recognized as a necessary qualification of the native citizen; and it would have been made a qualification of the native citizen, by this stipulation, if it had not already been one of his qualifications.

In 1891 the Choctaw council regarded special legislation as essential to the admission to Choctaw citizenship of Choctaws who had resided, since the emigration, in the state of Mississippi. The following act was approved April 8, 1891:

> An act admitting certain Choctaws from Mississippi to citizenship in the Choctaw nation.
>
> *Be it enacted by the general council of the Choctaw nation assembled*, That Joe Willis * * and Eva Sam, all having just come from the old nation, in Mississippi, are hereby admitted to all of the rights and privileges of citizenship in the Choctaw nation, and this act shall take effect and be in force from and after its passage.

The sixteenth general provision of the Chickasaw constitution of 1867 is subversive of the theory that the Chickasaw nation is a mere race, and not a body politic.

> Sec. 16. That no inconvenience may arise from the political separation between the Choctaws and Chickasaws, it is hereby declared that all rights, privileges and immunities of citizens, secured, under the fifth article of the treaty of June 22, 1855, to all Choctaws, who are now, or may hereafter become, residents, within the limits of the Chickasaw nation, are fully recognized and protected.

No qualification of citizenship is prescribed in either of the Choctaw or Chickasaw constitutions. But in the

Chickasaw constitutions of 1856 and 1867, and in the Choctaw constitution of 1860, residence is made one of the qualifications of voters and officers. It is also made one of the qualifications of officers in an act of the Chickasaw legislature, approved October 17, 1876, and in an act of the Choctaw legislature approved October 16, 1860; and by the act of November, 1886, it was provided that no non-resident Choctaw, having less than one-eighth Choctaw blood, should be admitted to Choctaw citizenship.

The question of the right of expatriation may not be exactly the same in the case of an independent sovereignty, like the United States, as in the case of a subordinate government, like one of the states, or the Chickasaw nation. And yet a citizen of the United States, who abandons his country and becomes a permanent resident of a foreign nation, loses, not only his state citizenship, but also his national citizenship. He may not become a citizen of the foreign nation, for, although capable of expatriating himself from one country, he may not be able to naturalize himself in another. Expatriation from one country does not *per se* effect naturalization in another. The Chickasaw by blood, who has abandoned his nation, has voluntarily and effectually expatriated himself, although incapable of making himself, without naturalization, a citizen of the United States. In Elk *v.* Wilkins, 112 U. S. 94, the supreme court held that:

> An Indian, born a member of one of the tribes within the United States, which still exists and is recognized as a tribe, by the government of the United States, who has voluntarily separated himself from his tribe and taken up his residence among the white citizens of a state, but has not been naturalized, or taxed, or recognized as a citizen, either by the United States, or by the state, is not a citizen of the United States, within the meaning of the first section of the fourteenth article of the amendments of the constitution.

But the court has not held that an Indian is incapable

of expatriating himself. On the contrary, in this opinion, the court said:

> The act of July 27, 1868, ch. 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting that, 'in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship,' while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another, without being naturalized under its authority.

The provision, to which the court referred, is embraced in the Revised Statutes, as follows:

> Sec. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the government thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; therefore any declaration, instruction, opinion, order or decision, of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.

The Chickasaws by blood, who have never resided in the Chickasaw nation, or performed any of the duties of Chickasaw citizenship, cannot, when the day arrives for the distribution of the lands and moneys of the Chickasaws, come in, like vultures after their prey, and demand all the benefits of citizenship. Nor can the Chickasaws by blood, who, after a residence in the nation, have abandoned the country, perpetrate such a wrong upon those who have faithfully performed the duties of citizens, and maintained the national existence, by steadfastly remaining on the soil. If the rest of the Chickasaws had been deserters, as these have been, and abandoned the country, there would be no lands to distribute; they would all have reverted to the United States.

II.

Citizens by Marriage.

The district judge has decided that by virtue of the first article of the treaty of 1855, and the thirty-eighth article of the treaty of 1866, the white man A, who marries a Chickasaw woman B, becomes at once invested with Chickasaw citizenship, not merely for jurisdictional purposes, but "to all intents and purposes," and thereupon acquires all the rights vested in native Chickasaws. He has decided that if A, after the death of his Chickasaw wife B, marries a white wife C, and white children are born of this second marriage, the white wife C and her white children all become Chickasaw citizens, each possessing the same vested rights. He has decided that if, after the death of the white husband A, his white widow C marries a second white husband D, and white children are born of this third marriage, the white man D and his white children all become Chickasaw citizens and acquire the same vested rights. And finally he has decided that if the white children of these several marriages themselves marry white persons, such white persons and their white children all become Chickasaw citizens and acquire the same vested rights. The judge assigns only the following grounds for his decision as to the rights of the white parties to these several marriages, and of their white descendants:

Under section 7 of the general provisions of the Chickasaw constitution, adopted August 16th, 1867, both as originally adopted and as amended, said sections can have but one construction and that that they regarded the said 38th article as binding on their future action, and if this is so, it would not be within the power of either the Choctaw or Chickasaw nation to pass, or adopt, any constitution, or law, in violation of said article, or that would take away the rights, privileges, or immunities, that had attached to any white person, under and by virtue of its provisions.

When a white person has married a Choctaw, or Chickasaw, according to their laws, and resides in the Choctaw or Chickasaw nation, he is, in all respects, as though he was a native Choctaw, or Chickasaw, and his rights, under the treaty, attach, and it is not within the power of the Choctaw or Chickasaw nation to take the same away, by legislation, or otherwise.

For the purposes of the argument let us assume at present that in the sense of the treaty the white husband or white wife of a Chickasaw or Choctaw is to be deemed a member of said nation "in all respects as though he (or she) was a native Choctaw or Chickasaw." Let us first ascertain the rights of the successive white husbands of white wives and white wives of white husbands and their white children; and afterwards the rights of white husbands and white wives of native Chickasaw citizens.

The reasons assigned by the judge for his decision seem to be applicable mainly if not wholly to the white person, who forges the first link in this endless and ramified chain of imputed citizenship. But the applicants themselves base their claims on two grounds, (1) the equality of civil and political rights secured to all Chickasaw citizens, and (2) their vested property rights.

Equality of Civil and Political Rights.

The appellees say that article 38 of the treaty of 1866 secures to the white husband of a Chickasaw woman all the rights of Chickasaw citizenship,—all the rights which a citizen of Chickasaw *blood* possesses; that a Chickasaw by blood has the right, by marrying a *white* wife, to confer Chickasaw citizenship upon her, and upon her children of *mixed blood;* and that, therefore, the *white* widower of a Chickasaw woman has the right, by marrying a *white* woman, to confer full Chickasaw citizenship upon her, and upon her *white children.* They say, further, that after the death of this *white* man, his *white* widow has the

right, by marrying a second *white* husband, to confer citizenship upon him and their *white* children, and so on *ad infinitum*. They say also that the white children of these several marriages, being themselves invested with all the rights of Chickasaw citizenship, have the right, by marrying white persons, to invest them and their children with full Chickasaw citizenship. There are three obvious fallacies in this reasoning:

First. If a citizen of Chickasaw blood has any right to *confer* citizenship upon his white wife, it is merely the right to confer citizenship upon the white wife of a citizen of Chickasaw blood. It is not the right to confer citizenship upon the white wife of a white man. The citizen of Chickasaw blood can not, by marriage, or in any other way, confer citizenship upon the white wife of a white man. If the rights of the white widower of a Chickasaw woman are the same as those of a citizen of Chickasaw blood, this white widower can not, by marrying a white woman, confer citizenship upon the *white wife* of a *white man*. If he could do that, his rights and those of the citizen of Chickasaw blood would not be equal. He would possess a right to which the citizen of Chickasaw blood could not possibly make any pretension. The citizen of Chickasaw blood, if he can *confer* citizenship, at all, can only confer it upon the *white wife* of a citizen of *Chickasaw blood*.

The only power which the native citizen has is this: Through the union of the two races, he is able to bring about such a result that both parties to the union and their children of mixed blood will be "deemed members of the nation." That power, in its entirety, is conferred upon the white man. Through a union of the two races, he, also, can bring about such a result that both parties to the union and their children of mixed blood will be

"deemed members of the nation." In this regard the white citizen now enjoys rights and powers exactly equal to those of the native citizen. But with equality of right he is not content. He demands superiority of right. With equal modesty, the *white citizen* of the United States may demand that, because he is entitled to all the rights of the *colored citizen*, he shall be enabled to make the child of his white wife a mulatto, and, failing in this demand, may insist that he is denied one of the rights accorded to his colored brother.

Second. If the white widower of a Chickasaw woman can, after her death, confer citizenship upon the white children of a white wife, he can do what the citizen of Chickasaw blood can not do; he has a right which the citizen of Chickasaw blood has not. For the citizen of Chickasaw blood can not confer citizenship upon white children; he can only confer citizenship upon children having an admixture of Chickasaw blood. Under the pretense of seeking equality of right the reasoning of the claimants, on both points, aims to secure to intermarried white persons, and their white descendants, unwarranted superiority of right.

Third. But the only right secured, by article 38 of the treaty of 1866, to the white man who marries a Chickasaw wife, is conferred upon the white man, not by the Chickasaw wife, but by the stipulation of the treaty. Individuals can perform acts which treaties, constitutions, or laws make essential to, or decisive of, citizenship; but they cannot confer citizenship.

If, as we are now assuming, article 38 of the treaty of 1866 conferred upon the white man who married a Chickasaw woman any right of citizenship beyond the right to live in the nation and to be subject to its laws, it is clear that the man who married a Chickasaw woman acquired

no right of citizenship at the instant when the marriage ceremony was performed beyond the right to be a citizen while he resided in the nation with his Chickasaw wife. It is not the man who merely marries a Chickasaw wife, that "is to be deemed a member of the nation," but the man who marries a Chickasaw wife and, after his marriage, resides with her in that nation. The right to Chickasaw citizenship, which he acquires at the instant of the marriage, is only an inchoate right. As long as he lives the possibility of the termination of his residence and of his citizenship remains; and upon the continuance of his residence, depends whatever right he has.

But then, article 38 of the treaty of 1866 contains no provision whatever for white persons, who marry the widows or widowers of Chickasaws, or for the white children of such marriages. For the convenience of the court I repeat the article:

> Article 38. Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw or Chickasaw nation, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw.

The provision of article 38 is that every white person, who, having married a *Choctaw or Chickasaw*, resides in the said Choctaw or Chickasaw nation, is to be deemed a member of said nation. It contains no declaration that every white person, who, having married a *white member* of the Choctaw or Chickasaw nation, resides in that nation, is to be deemed a member of said nation. It contains no declaration to the effect that every white woman, who, having married the surviving white husband of a Chickasaw wife, resides in the Chickasaw nation, is to be deemed a member of that nation, or that every white man, who marries the white widow of a Chickasaw, is to

be deemed a member of the nation. There is no ground for the assumption that the parties to the treaty intended to stipulate that every white person who, having married a white member of the nation, resided therein, was to be deemed a member of the nation.

Such a stipulation would not have promoted the interests of any party to the treaty. The reason for granting Chickasaw citizenship, to white persons intermarried with Chickasaws, is to be readily found in the public policy of the Choctaw and Chickasaw nations. It has been greatly to their advantage to promote marriages between white persons and their own citizens, and to incorporate intermarried whites into their bodies politic. This has been found to be one of the most important agencies in accelerating their progress in civilization. It has tended to advance their education, their agriculture, their commerce, and their legislation. Many of their best and ablest citizens, business men, agriculturists and legislators have been, and now are, of mixed blood. And, what is perhaps the greatest good of all, this intermarriage has wholly broken down all race barriers between the whites and the Chickasaws. But there is no such ground of policy for the promotion of marriages between whites and whites. The Chickasaws have no more interest in the marriage of white "members of the nation" to white persons who are not members of the nation, or in the marriage of white members of the nation to each other, than they have in the marriage of employes of the United States government to each other, or in the marriage of permit-men to permit-women. Nor has the government of the United States the slightest interest in the intermarriage of whites with whites, in the Chickasaw nation.

Whatever may be the nature or extent of the right secured to the white husband of a Chickasaw woman by

article 38 of the treaty of 1866, he will be divested of it, if he shall cease to reside in the nation, or shall wrongfully abandon her, or shall marry a white woman, either after her death, or after the divorce of the parties. Whatever rights of citizenship a white man may have, after he ceases to be a resident of the nation, or after he abandons his Chickasaw wife, or after he marries a white wife, those rights will be his, not by virtue of article 38 of the treaty of 1866, or of article 1 of the treaty of 1855, but by virtue of some other treaties, or of constitutions, laws, or usages of the Chickasaw nation.

The Chickasaws do not accept the construction which the district judge has given to article 38 of the treaty of 1866. They do not understand that the concluding words "in all respects as though he was a native Choctaw, or Chickasaw," qualify, or have any connection, in either sense or syntax, with the words, "is to be deemed a member of said nation." They understand these concluding words to qualify only the clauses conferring upon the nation civil and criminal jurisdiction of the intermarried whites. They believe that the text of the article shows, what they know the historical fact to be, that the article was adopted, not for the purpose of conferring upon intermarried whites property rights to Chickasaw lands, or moneys, or the right to vote, or hold office, but for the sole purpose of subjecting them to the jurisdiction of the Chickasaw courts, and thus relieving the nation from the intolerable nuisance resulting from the exemption of white husbands and wives of Chickasaws from the jurisdiction of their courts and from compulsory attendance on courts hundreds of miles distant from the Chickasaw country.

The Chickasaws contend that if the intent had been to attach to these intermarried whites any incidents of

membership in the tribe, beyond subjection to the jurisdiction of the Chickasaw courts, this jurisdictional subjection would not have been the only incident of membership specified in the article. They insist that if it had been the purpose to confer, upon these intermarried whites, the right to share in the lands, or moneys, of the tribe, or to vote, or hold office, such purpose would have been specified, as well as the purpose to subject them to the jurisdiction of the Chickasaw courts.

The provision is not that every intermarried white person "shall be a member of said nation," but that he "is to be deemed a member of said nation." This language on its face implies that they are to be regarded as members for some particular purpose. The next words show what that purpose was; they show that it was purely a jurisdictional purpose,—that the object was to subject these intermarried whites to the jurisdiction of the Chickasaw courts. The article discloses no other purpose for which they are to be deemed members of the tribe. If the intermarried whites are invested with any rights of citizenship, beyond the right to be subject to the jurisdiction of the Chickasaw courts instead of the courts of the United States, those rights have been derived, not from article 38 of the treaty of 1866, but from other treaties, or from Chickasaw constitutions, or laws.

But what are these claimants to gain by invoking the aid of other treaties, or of Choctaw, or Chickasaw constitutions, laws, or usages? The first of the provisions relating to this subject, appears in the treaty of October 20, 1832, between the Chickasaws and the United States in the following terms:

Article XV. The Chickasaws request that no person be permitted to move in and settle on their country before the land is sold. It is therefore agreed that no person whatsoever who is not a Chickasaw, or connected with the Chickasaws by marriage, shall be permitted to come into

the country and settle on any part of the ceded lands until they shall be offered for sale.

In 1832, then, both the Chickasaws and the United States held intermarried whites to be not members or citizens of the Chickasaw tribe or nation, but only persons "connected with the Chickasaws by marriage." Next come the following provisions, in the treaty of May 24, 1834:

Art. V. It is agreed that the fourth article of the "treaty of Pontitock" be so changed that the following reservations be granted in fee: "To heads of families, being Indians, or having Indian families consisting of ten persons and upwards, four sections of land are reserved. To those who have five and less than ten persons, three sections. Those who have less than five, two sections. Also those who own more than ten slaves shall be entitled to one additional section, and those owning ten and less than ten to half a section."

Art. VII. Where any white man, before the date hereof, has married an Indian woman, the reservation he may be entitled to, under this treaty, she being alive, shall be in her name.

If the white head of a Chickasaw family had been recognized by the parties to this treaty as a *member of the tribe*, he would not have been denied the place accorded to Chickasaw heads of families in the allotment of the lands. But he was not so recognized. The Chickasaw wife took the family allotment in her own name. In 1834, therefore, neither the Chickasaws nor the United States admitted intermarried whites to be *members of the Chickasaw nation.*

The following law was enacted by the Choctaw council in 1840:

Be it enacted by the general council of the Choctaw nation assembled, that no white man shall be allowed to marry in this nation unless he has been a citizen (resident?) of the same for two years. * *

And be it further enacted, that no white man, who shall marry a Choctaw woman shall have the disposal of her property without her consent; and any white man parting with his wife, without just provocation, shall forfeit and pay over to his wife such sum or sums as may be adjudged to her by the court for said breach of the marriage contract and be deprived of citizenship.

By this statute the Choctaws virtually recognize the concession of limited citizenship to intermarried whites.

But they do not recognize in this citizenship any vested right. In the first place, although prior to the passage of an act relating to the property of married persons, approved Oct. 10, 1848, marriage transferred to the Choctaw husband all the wife's personal property in possession, it was nevertheless provided in the act of 1840, quoted above, that marriage should not transfer to the white husband of a Choctaw wife her property in possession. And, in the second place, if the white husband parted with his Choctaw wife, without just provocation, he was to be deprived of his limited citizenship, whatever it amounted to. It was not a vested right.

The following imperfect law was enacted by the Choctaw legislature in 1853:

Be it enacted by the general council of the Choctaw nation assembled, That William Morrison, Thomas Morrison, Sarah Jane Morrison, Molly Redhead, Betsey Heart, Rebecca Heart, Philip Keggo, and infant child of Philip Keggo, Rosa Ayres, Betsey Ayres, Julian Ayres, Mary Ayres, Sophonia Ayres, and Sallie Ayres; and they are hereby declared naturalized citizens of the Choctaw Nation, invested with all the rights, privileges and immunities of naturalized citizens of the same.

In 1853, naturalized citizens of the Choctaw nation were not invested with all the rights of Choctaws. They had only the rights, privileges, and immunities of naturalized citizens. What the rights, privileges, and immunities of naturalized citizens were the record does not show.

The following are general provisions of the Chickasaw constitution of 1856:

Section 8. Any person, other than a Chickasaw, having legally intermarried with a Chickasaw woman, shall participate in the Chickasaw annuities, but shall not be eligible to any office of trust in this nation. In like manner, a wife, other than a Chickasaw woman, having legally married a Chickasaw husband shall participate in the annuities of the Chickasaw tribe; provided, they are residents of this nation. This rule shall cease in case where a husband or a wife, other than Chickasaws, die or be separated from the bonds of matrimony. But such death or separation shall not affect the right of the children (born during such intermarriage) to participate in all the rights, privileges, and immunities of the Chickasaws.

Section 10. No retrospective payments shall be made out of the Chick-

asaw moneys to any person herein adopted, or which may be hereafter adopted under the constitution.

Section 11. The legislature shall have the power, by law, to admit or adopt any person to citizenship in this nation except a negro, or descendant of a negro; provided, however, that such an admission, or adoption, shall not give a right, further than to settle and remain in the nation, and to be subject to its laws.

By the foregoing constitutional provision only a single right of citizenship was secured to the intermarried white. That right amounted to nothing. It was the right to participate in the Chickasaw annuities. The only annuities to which the Chickasaws are, or ever have been, entitled, are the annuities of $3,000 per annum, secured by the treaty of July 18, 1794. They amount to only seventy-five cents per annum for each Chickasaw. These trifling sums have not been distributed *per capita*. The whole amount has been used to defray the expenses of the tribal government. But even this diminutive right was held not to be a vested right. It was to be taken away, when the marriage relation between a white person and a Chickasaw should be terminated, either by death or by divorce. Moreover these intermarried whites were expressly denied the right to hold any office of trust, or profit, in the nation, and it was expressly provided that no admission or adoption "to citizenship" should "give a right further than to settle in the nation, and to be subject to its laws."

Now whatever may, or may not, have been the fate of the foregoing constitutional and statutory provisions after the treaty of 1866 took effect, it is, of course, certain that prior to the date of that treaty they were valid and operative. After the date of that treaty the claim of these intermarried whites was invalidated by the 43d article of that treaty.

The following is article 43 of the treaty of 1866:

Article 43. The United States promise and agree, that no white person, except officers, agents, and employes of the government, and of any internal improvement company, or persons traveling through or temporarily

sojourning in the said nations, or either of them, shall be permitted to go into said territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations, into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons, who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement, as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with, or invalidate, any action which has heretofore been had, in this connection, by either of the said nations.

It is provided, in the foregoing article that, with certain specified exceptions, no white person shall be permitted to go into the Choctaw and Chickasaw territory, unless formally incorporated and naturalized, by the joint action of the authorities of both nations, into one of the said nations, according to their laws, customs, or usages. The specified exceptions are (1) officers, agents and employes of the government, and of any internal improvement company; (2) persons traveling through or temporarily sojourning in the said nations, or either of them; (3) parties adopted before the date of the treaty; (4) employes, who are teachers, mechanics, or persons skilled in agriculture.

It will be observed that these exceptions do not, in terms, include white persons, who have married white "members of the nation," whether before, or since, the date of the treaty. It will be observed also that the *adopted* citizen is distinguished from the intermarried citizen, in article 38 of the treaty of 1866, and that this distinction has been constantly recognized, not only by the Chickasaw government, but also by the government of the United States. There is no substantial basis for a claim that this distinction has been ignored in article 43. The assumption that the words "*heretofore adopted*," as used in article 43, mean *heretofore intermarried*, is not warranted by anything in the treaty itself, or in Chickasaw legislation, or in the transactions between the Chick-

asaws and the United States. If such be not their meaning, it follows, of course, that no white person, married to a Chickasaw, can be a member of the Chickasaw nation in all respects as though be were a Chickasaw, or even be invested with a restricted membership in that nation, unless married in accordance with Chickasaw law or usage sanctioned by general or special Choctaw legislalation, or usage, whether married before, or after, the date of the treaty of 1866.

It may, however, be urged that the proviso of article 43 in favor of white persons adopted before the date of the treaty, although not in terms embracing intermarriages prior in date to that treaty, ought to be construed to embrace them. Let this be assumed for the purposes of the argument.

If, now, we look at the face of article 38, and at the face of article 43, we discover an apparent inconsistency between the two stipulations. According to article 38, the white person who married a Chickasaw and resided in the Chickasaw nation, was to be "*deemed a member* of the nation," for some or all purposes. According to article 43, he was *not* to be permitted *to enter* the nation, unless incorporated into one of the two nations, by the joint action of the authorities of both. If, according to article 38, a white man who should, after the date of the treaty, marry a Chickasaw woman and reside in the Chickasaw nation, was to be *deemed a member* of the nation, he was nevertheless, by article 43, *excluded* from the nation, unless incorporated and naturalized therein by the joint action, of the authorities of both nations. If, by article 38, a white person, adopted after the date of the treaty, was to be *deemed a member* of the nation, article 43, nevertheless, *excluded* him from the nation, unless incorporated therein, by the joint action of the authorities of both nations.

How, then, are these repugnant provisions of the two articles to be reconciled? Only by so construing them that claimants of citizenship, by marriage or adoption subsequent to the treaty of 1866, shall not be deemed members of the nation, for any purpose, unless married or adopted according to the laws, customs, or usages of both nations.

An attempt is made to evade and practically nullify this 43d article of the treaty, by the following line of argument. It is contended that although embraced in a tri-partite treaty, it was not itself a tri-partite stipulation, but was only a uni-lateral promise by the United States; that it did not affect the relations of the whites to the Chickasaws; that, while it did fix the relations of the United States to the Choctaws and Chickasaws on the one hand, and to the whites, on the other, it did not fix the relations between the Chickasaws or Choctaws and the whites, but left those relations subject to the provisions of article 38; that while it bound the United States not to permit these claimants to "go into said territory," it did not bind, or authorize, the Choctaws or Chickasaws not to permit them to "go in," and did not authorize the Choctaws or Chickasaws to insist that the United States should not permit them to do so; but, on the contrary, left the Choctaws and Chickasaws subject to the obligation, alleged to be imposed by article 38, not only to permit them to "go in," but to permit them to remain, and to invest them with all the rights of native citizens.

According to this mode of interpretation, a treaty which, in one article, imposes upon the first party an obligation not to permit a certain thing to be done, to the detriment of the second party, in another article, not only imposes upon the second party an obligation to refrain from insisting that the first party shall perform his promise, but

also imposes upon the second party an obligation to do the very thing, which the first party agrees not to permit to be done. That this article was intended by the parties to bind the Choctaws and Chickasaws, as well as the United States, is shown by those clauses, which relieve the Choctaws and Chickasaws from its operations, as to teachers, mechanics, skilled agriculturists, and works of internal improvement. These exceptions unmistakably indicate the general intent of the parties.

Claimants of citizenship, by virtue of intermarriage or adoption since 1866, must have proved that they were adopted or married in accordance with the laws, customs, or usages of both nations. The burden of proof was on them. This is not a harsh or unnecessary requirement; for every Choctaw and Chickasaw citizen will be entitled to an allotment of an equal share in all the lands of the two nations. To permit one nation to introduce additional shareholders, without the consent of the other, would be manifestly unjust. It would be injurious to the Chickasaws, as well as to the Choctaws, to admit a swarm of claimants, upon a mere presumption that their adoption, or marriages, had been consummated in conformity with the requirements of article 43 of the treaty of 1866. It is no hardship on a claimant to require proof of his right to the allotment of a share in the Choctaw and Chickasaw lands. This necessary proof has been furnished in very few of the Chickasaw citizenship cases. It results that few of the claimants of this class can be enrolled as Chickasaw citizens entitled to allotments of Choctaw and Chickasaw lands.

By the 5th section of the act of the Choctaw council, approved Nov. 9, 1875, it is provided as follows:

Should any man or woman, a citizen of the United States, or of any foreign country, become a citizen of the Choctaw Nation by intermar-

riage as herein provided, and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship; unless he or she shall marry a white man or woman, or person as the case may be, having no rights of Choctaw citizenship by blood, in that case all his or her rights acquired under the provisions of this act shall cease.

It is provided in the Chickasaw act of October 19, 1876, as follows:

Section 3. *Be it further enacted*, that no marriage heretofore solemnized, or which may hereafter be solemnized, between a citizen of the United States and a member of the Chickasaw nation, shall enable such citizen of the United States to confer any right or privilege, whatever, in this nation, by again marrying a citizen of the United States, upon such other citizen of the United States or their issue, and in case any citizen of the United States shall have married a member of the Chickasaw nation, and shall have heretofore abandoned her, or should hereafter voluntarily abandon or separate from such member of the Chickasaw nation, such citizen of the United States shall forfeit all rights acquired by such marriage in this nation, and shall be liable to removal as an intruder from the limits thereof.

It is contended that these enactments are both repugnant to article 38 of the treaty of 1866, and therefore void. But this is a mistake. That article secures no rights whatever to white husbands of white women or to white wives of white men.

The following is one of the general provisions of the Chickasaw constitution of 1867:

Sec. 7. All persons, other than Chickasaws, who have become citizens of this nation by marriage or adoption, and have been confirmed in all their rights as such by former conventions, and all such persons as aforesaid who have become citizens by adoption by the legislature, or by intermarriage with the Chickasaws, since the adoption of the constitution of August 18th, 1856, shall be entitled to all the rights, privileges, and immunities of native citizens. And all who may hereafter become citizens either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of governor

The foregoing provisions were, of course, subordinate to article 43 of the treaty of 1866. None of them can be valid, without the joint action of the Choctaw and Chickasaw authorities, except the single provision, which ratifies the adoption of citizens by the separate action of the Chickasaw legislature, before the date of the treaty of 1866. None of its provisions have been validated by the

joint action of the Choctaw and Chickasaw authorities. Moreover it contains no provision expressly, or by implication, securing the rights of citizenship to the white husband of a white wife, or to the white wife of a white husband, or to their white children, or to the surviving white husband of a Chickasaw wife after his subsequent marriage to a white woman.

The rights secured to intermarried whites, by the treaty of 1866, are not to be expanded beyond the limits fixed by the acquiescence of the three parties to the treaty. They embrace the right of the white person, who marries a Chickasaw or Choctaw, to enjoy, during the residence of the husband and wife in the nation, in the marriage relation, and, after the death of the Chickasaw or Choctaw, until a subsequent marriage to a white person, whatever benefits of citizenship are secured to intermarried whites by article 38 of the treaty of 1866. So far the Choctaws and Chickasaws have gone, since the date of the treaty of 1866, with the acquiescence of the United States. But they have gone no further. They have never consented that the white wife of the surviving husband of a Chickasaw woman should be invested with any of the rights of citizenship. They have never consented that the white husband of the white widow of a Chickasaw should be invested with any of the rights of citizenship. Nor have they ever consented that the white children of white parents should be invested with any of those rights. More than that, they have never consented that the surviving white husband or white wife of a Chickasaw should, after a subsequent marriage to a white person, enjoy any rights in the Chickasaw nation beyond the right to reside in the nation, exempt from liability to eviction as an intruder.

Vested property rights.

Again, the applicants contend that the treaties of 1855 and 1866 secured to the white man, when he married a Chickasaw woman, a vested right to a share in all the lands of the Chickasaws and Choctaws; that when, after the death of his Chickasaw wife, he married a white woman, he conferred upon her full Chickasaw citizenship, and, therefore, she acquired a vested right to a share in all the lands of the Chickasaws and Choctaws; and that, when white children were born of this second marriage, they acquired Chickasaw citizenship and vested rights to share in all those lands.

It is contended that rights, confirmed by the judgments of the district court, will be destroyed or impaired if those judgments shall be reversed. But the appellees have not, through those judgments, or otherwise, acquired, nor do they possess any vested property rights to lands or moneys of the Chickasaw nation. The lands, held in common by the Chickasaw and Choctaw nations, are the public property of those nations. The individual Chickasaws and Choctaws are not, as counsel asserts, tenants in common of those lands; nor do they hold those lands in any other form of individual ownership. Nor do the citizens of those nations hold, as individuals, the public moneys of the respective nations. This question was decided by the court of claims, in the opinion delivered January 9, 1899, in Choctaw Nation *et al. v.* United States *et al.*, p. 64, as follows:

It was not the object of the treaty of 1855 to recognize rights of private ownership or change the nature of the Indian title of occupancy into one of different character. That treaty on its face shows it was in settlement of the claims of the Chickasaws as against the Choctaws, and the lands covered by the guaranty were to be held in common thereafter by the two tribes instead of one; that is, each member of each tribe was to

have the same rights in the country of the two nations that the members of one tribe formerly had under the treaty of 1830, before the convention of 1837 between the two nations. The guaranty was intended to secure to two tribes in common what one tribe had before then enjoyed to itself alone. The land continued to be tribal land after this treaty as much as it had been before, in the sense that when it again became the subject of treaty with the United States the nations could only deal with it, and when they ceded it such cession by them extinguished the claims of the members absolutely.

The relation of the citizens of the Chickasaw and Choctaw nations, to the lands and moneys of those nations, is, so far as this point is concerned, practically the same as the relation of the citizens of the United States to the public lands and to the public moneys of the United States. All the citizens of the United States are equally interested in the public lands and moneys; but none of them are invested with individual ownership therein. Those lands and moneys are public property of the nation,—not in any sense nor for any purpose private property of the citizens. Precisely the same thing is true of the relation of the citizens of the Chickasaw and Choctaw nations to the lands and moneys of those nations. That relation is easily ascertained. The Choctaw treaty of October 18, 1820, contains the following clause:

Art. 2. For and in consideration of the foregoing cession on the part of the Choctaw nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said states, do hereby cede to said *nation* a tract of country west of the Mississippi river, situate between the Arkansas and Red river, bounded as follows, &c.

The act of May 28, 1830, contains the following provision:

Sec. 3. *And be it further enacted*, That in the making of any such exchange, or exchanges, it shall and may be lawful for the president solemnly to assure the *tribe*, or *nation*, with which the exchange was made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them; and, if they prefer it, the United States will cause a patent, or grant, to be made and executed to them for the same: Provided always that such lands shall revert to the United States, if the Indians become extinct, or abandon the same.

The treaty of September 20, 1830, contains the following stipulation:

Article 2. The United States, under a grant specially to be made by the president of the United States, shall cause to be conveyed to the Choctaw *nation* a tract of country, west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, &c.

The patent, granted by the president, March 23, 1842, contains the following clause:

Know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant unto the said Choctaw *nation* the aforesaid tract of country, &c.

By the "convention and agreement" of January 17, 1837, the Chickasaw *nation* purchased, from the Choctaw nation, a part of the land acquired from the United States by the above-mentioned treaties and patent. The following is the stipulation:

Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country to be held on the same terms that the Choctaws now hold it, except the right of disposing of it (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Choctaw nation, &c.

The tract sold to the Chickasaws was carved out of the middle portion of the Choctaw country. It contains 4,650,935 acres. There remained to the Choctaws a tract of 6,668,000 acres east of the "Chickasaw district," and a tract of 7,713,239 acres west of that district; these two Choctaw tracts amounting, in the aggregate, to 14,381,239 acres. The three tracts amounted, in the aggregate, to 19,032,174 acres. The Chickasaw tract was sold to the Chickasaw nation, not, as private property, by individual Choctaws, but, as public property, by the Choctaw nation. The effect of the sale was to make the Chickasaw nation the owner of the land sold.

In 1855, the authorities of the United States found it desirable to obtain a lease of the Choctaw tract of 7,713,-

239 acres west of the Chickasaw district, for the settlement of certain tribes of friendly Indians. But the lease of that tract would leave, to the Choctaw nation, only the tract east of the Chickasaw district. The result would be that, although the population of the Choctaw nation bore, to the population of the Chickasaw nation, the proportion of 3 to 1, and the proportion of the Choctaw to the Chickasaw land, before the lease of 1855, was that of $14\frac{38}{100}$ to $4\frac{65}{100}$, or, approximately, 3 to 1, the lease of the western tract would leave the proportion, of the Choctaw to the Chickasaw land, that of 3 to 2. To obviate this manifest injustice, by securing to the Choctaw nation its due proportion of 3 to 1, in the lands not leased, the treaty of 1855 transformed the separate ownership of the two nations, in the three tracts, into ownership in common, and leased the western tract to the United States. The following is the language of the treaty of 1855:

> And pursuant to an act of congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole; Provided, however, no part thereof shall ever be sold, without the consent of both tribes; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

The result of these arrangements was to make the two nations owners in common of their whole territory, including the district subject to the lease, in the proportion which the population of one bore to that of the other. The "interests" of Chickasaw citizens in these lands are widely different from the rights which tenants in common hold in their lands. The tenant in common can convey, mortgage, or devise his property rights in the land. The Chickasaw can do neither of these things. The tenant in common can have partition. The Chickasaw can not. At the death of the tenant in common,

leaving children, his estate does not escheat; it descends. At the death of the Chickasaw, leaving or not leaving children, his interest in the lands of the nation does not descend; it merges in the common stock and escheats. It is, in this respect, like the interest of the citizen of the United States in the public lands. A deed, executed by all the tenants in common, conveys their land. A deed of Chickasaw land, executed by every Chickasaw, conveys nothing. If a tenant in common dies, leaving, say, five children, the interests of the five children are not, in the aggregate, five times the father's; they are only equal to the father's. But if a Chickasaw has five children, their interests, whether he lives or dies, are, in the aggregate, five times as large as his own.

The contention that the act of congress, authorizing these appeals, destroys, or impairs vested rights of citizens by blood, is based upon the paragraph just quoted from article 1 of the treaty of June 22, 1855.

The claim that the law, authorizing these appeals, disturbs vested rights of citizens by marriage or adoption, is based upon the same stipulation coupled with article 38 of the treaty of April 28, 1866, of which the following is the text:

Art. 38. Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals, and to punishment, according to their laws in all respects as though he was a native Choctaw, or Chickasaw.

The case of citizens by blood is to be considered first. If these words, "so that every member of either tribe shall have an equal undivided interest in the whole," were applied to persons who, under treaties, constitutions, or laws, were permitted to convey, mortgage and devise their estates in lands,—whose children could take their lands by inherit-

ance, but, during the life of the father, could acquire no vested interest in lands held by him as tenant in common, these words, disconnected with other treaty stipulations, and unexplained by the context, might be construed to imply that such persons were to be invested with rights of private property in the land. But, inasmuch as they are, in fact, applied to persons who can not convey, mortgage, or devise,—whose children can not take by inheritance, but become at birth, each, invested with interests equal to that of the father, not because they are heirs of their father, but because they are constituent units in the body politic, these words aptly qualify interests, not in private, but in public property.

The words, "each and every citizen of the United States shall have an equal undivided interest in the whole of the public lands," would accurately characterize the relation of citizens of the United States to those lands. The words of the treaty mean that the Chickasaw holds his "interest" as an interest, not in private, but in public property,—not in his private capacity, but in his capacity as a part of the body politic. They mean that the two nations, made up of the aggregate of their respective members, are to hold the lands of both nations in common, but in shares proportionate to the numbers of their citizens respectively.

The treaty of 1855, on which the appellees base their contention that the individual Chickasaws have vested rights of property, in Choctaw and Chickasaw lands, was made between the United States and the Choctaw and Chickasaw *nations*. These nations were capable of making treaties. As we have seen, they have made many treaties with the United States. They were competent to sell and purchase lands. They had, as nations, sold land east of the Mississippi to the United States, and pur-

chased land west of the Mississippi from the United States. The Choctaw nation had sold an undivided interest in its lands to the Chickasaw nation. It is to-day in the power of those nations, acting in their corporate capacity, to sell their country to the United States. They can transfer, not only dominion over, but property in this land. In so doing, they will not take private property and dispose of it for public use, but will sell public property. To land in such a condition the individual Chickasaw can have no vested right excluding the power of congress to authorize appeals in these citizenship cases.

But is it contended that the Chickasaw has a vested right to the *use* of a separate portion of the common domain of the Choctaw and Chickasaw nations, and that, in this respect, his interest, in that common domain, differs from the interest of the citizen of the United States in the public lands of the nation? An analysis of the Chickasaw's interest will show that there is no difference, which can affect the issues involved in the pending appeals. The Choctaws and Chickasaws together number 20,000. They own more than 10,000,000 acres of land, exclusive of the leased district. An equal division, in severalty, would secure to each Chickasaw and Choctaw more than 500 acres. But if any member of either tribe should undertake to segregate a tract of 500 acres from the common stock, and appropriate it to his own use, he would undertake to appropriate to his own use that to which 19,999 others have rights identical with his own. Such an undertaking would resemble an undertaking by a citizen of the United States to secure the separate use of a part of the pulic lands. The treaty of 1855 does not secure to the individual Chickasaw the exclusive use of any separate parcel of the land of the Chickasaw and Choctaw nations. Their rights to such use are practically

squatter's rights, regulated, in a rude way, by statute. It is true that individual Chickasaws enjoy the exclusive use of separate tracts, some holding thousands of acres, others holding each less than a score. There is no equality of use.

While the individual Chickasaw has no treaty right to the use of any specific tract of the common domain, he has a treaty right to his share of the net usufruct of the entire territory of the two nations. But this is precisely the right which the citizen of the United States holds in relation to the public lands. In either case the benefit comes, not directly to the citizen, but to the nation, and, through the nation, to the citizen as a part of the body politic. A judicial determination that a person is a citizen of the Chickasaw nation, or a citizen of the United States, does not make his citizenship a vested property right in the public lands, or carry with it a vested property right in the public lands of the Chickasaw nation, or of the United States, such as to exclude a reversal of a judicial determination of a party's citizenship, on the ground that such reversal would *disturb vested property rights in the public lands.*

The law conferred upon the district judge no power to vest any property rights in anybody. It purported to authorize him to decide who were citizens; but it did not purport to authorize him to decide what rights the citizen possessed and thereby vest in him those rights. There are three classes of Chickasaw citizens,—citizens by blood, by marriage, and by adoption. The law purported to empower the judge to find as he did find that the three appellees in this case were citizens by marriage. But it did not authorize him to decide that the rights of the intermarried citizens were the same as those of the citizen by blood and by such decision vest in the intermarried

citizen all the property rights of the citizen by blood. Having found that the appellees were *citizens by marriage*, he proceeded to decree that they were *citizens*, and thereupon accorded to them "all the rights and privileges appertaining to such relation," meaning all the rights and privileges of citizens by blood. His decision that these persons had this or that right was a nullity. It vested no property right in either of the appellees. Their status so far as vested property rights are concerned is fixed not by Judge Townsend's decision,—not by his construction of the treaties and laws,—but by the treaties and laws themselves.

III.

Citizens by Adoption.

The following act of the Chickasaw legislature was approved by the governor of the nation, on the 17th of October, 1856:

An act granting citizenship to the heirs of Wm. H. Bourland.

Sec. 1. *Be it enacted by the legislature of the Chickasaw nation*, That the right of citizenship is hereby granted to the following-named children and nephews of Wm. H. Bourland: Nancy, Amanda, Matilda, Gordentia and Run Hannah.

Approved October 17, 1856.

C. HARRIS,
Governor.

The only right of citizenship, conferred by this act, was the right "to settle and remain in the nation and to be subject to its laws." For the act was subject to and limited by the following general provision of the Chickasaw constitution adopted August 18, 1856:

Sec. 11. The legislature shall have power by law to admit, or adopt, any person to citizenship in this nation, except a negro or descendant of a negro: Provided, however, that such an admission, or adoption, shall not give a right further than to *settle and remain in the nation and to be subject to its laws.*

If, then, the act of October 17, 1856, were still in force,

its only effect would be to secure, to the beneficiaries of the act, the right "to settle and remain in the nation and to be subject to its laws." But this act, restricted in scope, as it was, by the constitution of August 18, 1856, was repealed by the following act of November 25, 1857:

An act repealing all the acts of 1856 which are not adopted:

Be it enacted by the legislature of the Chickasaw nation, That from and after the passage of this act all certified copies of the laws that were passed in the legislature of 1856, that are not adopted by the legislature of 1857, are hereby repealed.

Approved November 25, 1857.

C. HARRIS,
Governor.

The facts, connected with the alleged adoption of Bourland's heirs, are set forth in the following affidavit:

INDIAN TERRITORY,)
Chickasaw Nation.)

Before me, the undersigned authority, on this day, personally appeared Overton Love, who, being by me duly sworn, on oath deposes and says: That he is a Chickasaw Indian by blood, and emigrated from Mississippi to the Indian Territory in the year 1843; that he is 73 years of age; that he was the first Speaker of the House of Representatives of the first Legislature of the Chickasaw Nation, in 1856, and has been connected, more or less, with the public affairs of said Nation since that date; that he has filled the position of county judge, district judge, representative, senator, and delegate to Washington; that he, in 1856 and prior thereto and until his death, was intimately acquainted with William H. Bourland; that the said William H. Bourland, was a United States citizen, and the father of Nancy, Amanda, Matilda, and Gordentia, and the uncle of Reece Hannah; these were his children by his first wife, who was a United States citizen; that sometime in the fifties he married Caroline Willis, a Chickasaw citizen, who is yet living; that in the year 1856, at the first session of our legislature, William H. Bourland presented an application to the legislature, asking that these children be adopted under the constitution as it then existed, so that they might live with him while he lived in the Chickasaw nation,—the only object being that they might have the right of residence and not be ejected by the Chickasaw authorities. In accordance with his application, the act of October 17, 1856, was passed. Sometime during the year 1856, the laws of the Chickasaw nation not having been published became misplaced and lost; and at the session of the legislature in 1857, an act was passed repealing all the laws enacted in 1856, except those especially adopted by the legislature in 1857. The act adopting the children of William H. Bourland and his nephew Reece Hannah was among those repealed; and about that time said William H. Bourland having abandoned the idea of having them adopted, and setting up no claim that they had been adopted, left the Chickasaw nation and removed to Texas, where he afterwards died. I was intimately acquainted with the whole family; and after he removed to Texas his three daughters boarded at my house

and attended school. From that date, until after A. B. Roff had married Matilda Bourland and her death in Texas, I never heard of any claim being made that said children had been adopted. About that time A. B. Roff came to see me and to learn whether or not his first wife and her sister had been adopted, his object being to learn so that he could move over into the Chickasaw nation. I then informed him that they had not been adopted, except as stated above; but I told him that I thought that if he wanted to move in the Chickasaw nation, and would keep quiet, go on and attend to his business, that the Indians would not object to his staying in the Chickasaw nation. After that he moved over into the Chickasaw nation, and has continued to reside here ever since. I am personally acquainted with the fact that at no time, after the repeal of the law adopting said children, said law was published as such in any of the books containing the laws of the Chickasaw nation, until after the treaty of 1866 between the Chickasaw nation and the United States When this treaty was made it became necessary for the Chickasaws to revise their laws and the constitution. A committee was appointed by the governor, to codify the laws and amend them, and have the same published; after which they were to be voted upon by the people for adoption or rejection. About 1866 this election was held. It then developed that this convention, or committee, had had published the old law adopting the Bourland heirs; and this among other laws was specially mentioned to be voted upon by the people for adoption or rejection. After the act adopting them was rejected by the people, the governor issued his proclamation declaring the result. This was the only act rejected; and, by some oversight, in 1876 when the laws were published again, it was again placed in the published laws. Of my own personal knowledge I know nothing further than to say that since about 1876, whenever the matter was agitated a little, it was by some manner suppressed. I will further state that Joseph Brown, who married Amanda Bourland, sister of Alva Roff's wife, in about 1870 or 1871, went to my uncle Judge Robert Love, and employed him to have his right established as an adopted citizen. Upon learning this fact, I went to him and then to Colonel Bourland, and told them that, if they insisted on doing this, that it would be my duty to tell what I knew about how they were adopted, and what I have stated above, but that, his being a friend of mine, if he kept quiet he could remain here, and I would say nothing. Whereupon no further action was taken by him. I further state that Joe McKinney, who married Gordentia, a sister of Alva Roff's wife, about the year 1880, moved into the Chickasaw nation, from Texas, and settled near me, as a neighbor; he frequently talked to me about his wife's right and I explained it fully to him; and, after living here about two years, he moved back to Texas. Since then I have known nothing further about him.

(Signed) OVERTON LOVE.

Subscribed and sworn to, before me, this the 2d day of October, A. D. 1896.

G. W. ADAMS,
Notary Public.

The clerk to whom, as master, this cause was referred by the district judge, decided that the act of November 25, 1857, did not repeal the act of October 17, 1856. He

based his decision upon the following grounds: (1) That it did not repeal any laws, but only repealed copies of laws; and (2) that it did not repeal the act of October 17, 1856, because that act was not "expressly mentioned," in the repealing act. The master was mistaken on both points. So was the judge who adopted his reasoning and his decision. The law, enacted November 25, 1857, repealed all the laws which had been enacted by the legisture of 1856, and were not adopted by the legislature of 1857. The laws, so repealed, included the act which conferred upon the children and nephews of Wm. H. Bourland the right "to settle and remain in the nation and to be subject to its laws."

In the year 1857, when this repealing act was passed, the constitutional government of the Chickasaws was one year of age. Their legislature had assembled for the second time. Their law-makers had experimented in legislation only once. To all of them the methods, forms, and language of legislation were new. To most of them the English language, in which they framed their laws, was an unknown tongue. They had not yet passed the stage of semi-civilization. They were not familiar with the maxims of Cooley, Sedgwick, and Dwarris, or with the master's rules for English composition.

The laws which had been enacted at the previous session of the legislature had never been printed, but existed only in certified manuscripts called certified copies. At that time the authoritative copies of the laws of the United States, which were deposited in the state department, were not printed copies, but manuscript copies, certified by the secretary of state. The legislature employed, in the act of 1857, phraseology which, understood as the master and district judge understood it, if not absolutely devoid of sense, had a meaning super-

latively absurd. Their decision was that the scope and effect of the act were, and were intended to be, not to repeal the *laws* enacted in 1856, but only to repeal certified *copies* of those laws. But the Chickasaws neither intended nor achieved any such absurdity. They employed language which, unskilled and bungling as it is, must compel the common sense of every intelligent man, whether lawyer or layman, to recognize in the act an intention and a successful attempt to repeal, not copies of the laws of 1856, but the laws themselves.

The master says:

> If, as a matter of fact, the legislature did intend to repeal all former statutes, the language employed does not convey to the legal mind the faintest semblance of such an intention.

The master was mistaken. The "*legal mind*" is not separated from common sense by so wide a gulf. The legal mind, of ordinary intelligence, if not the unfortunate victim of a foregone conclusion, sees at a glance, as common sense sees at a glance, that these Indians, by the use of this awkward phraseology, in a tongue but little known to them, intended, not to repeal *copies*, but to repeal *laws*. The "legal mind" and common sense, instead of looking at *particular words* in a crudely phrased Chickasaw law enacted in 1857 for an absurd, not to say impossible, meaning, will look to *all its parts* —to its whole *scope*, *object*, and *effect*—for a rational meaning of the law.

The master must have overlooked the title of the repealing act of 1857. That title is not skilfully framed; but is easily understood.

> An act repealing all the acts of 1856 which are not adopted.

The law prescribing the use to be made, by United States courts, of the title of a statute, in ascertaining the scope of such statute, has been expounded by the Su-

preme Court. In United States *v.* Fisher, 2 Cranch, 358, 386, Chief Justice Marshall, delivering the opinion of the court, said:

> On the influence which the title ought to have, in construing the enacting clauses, much has been said; and yet it is not easy to discern the difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and, in such case, the title claims a degree of notice, and will have its due share of consideration.

The rule stated by Chief Justice Marshall, which is based upon solid ground of principle, had already been recognized by the highest English authorities. In the great case of Stradling *v.* Morgan, Plowden 203, the question was whether the general word "receivers," used in the body of an act entitled "An act for the true answering of the King's revenue," extended to *all receivers*, or was restricted to the *King's receivers*. The court held that it was restricted to the King's receivers and ministers, and said:

> Against them (the King's receivers) only was the act intended to be made; which may be collected from the words of the act in other branches, for the stile (title) of the act is "An Act for the true answering of the King's revenues," so that the stile (title) signifies the scope of the act to be touching the matters of the King and his ministers.

In the King *v.* Cartwright, 4 Term Reports 490, the question was whether the provision of 9 Geo. 2, c. 35, s. 26, was, or was not, restricted to assaults on officers *while acting in their official capacity*. The following was the title of the act:

> An act for indemnifying persons who have been guilty of offenses against the laws made for securing the revenues of customs and excise, and for enforcing those laws for the future.

Mr. Justice Buller held that "the intention of the legislature might be collected from other parts of the act,

which was made for the sake of the revenue, *as its title imported.*"

Dwarris (p. 502) says :

In the King *v.* George Marks and others, 3 East 160, where it was held that the unlawful administering, by any associated body of men, of an oath to any person, not to reveal or discover such unlawful combination, etc., is felony, within 37 Geo. 3, c. 123, though the object of such association was to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition, the words of the title were relied upon, which is generally against the administering or taking of unlawful oaths.

The following are the precise words of the title of this act: "An Act for more effectually preventing the administering or taking of unlawful oaths." In Rex *v.* Inhabitants of Gwennap, 5 Term Reports, 135, Grose, J., said: "If we read the titles and preambles of the three acts (which are in *pari materia*), there can be no doubt." As we have seen, the title of the repealing act of 1857 is "An Act repealing all the *Acts* of 1856, which are not adopted." A scrutiny of this title, in connection with the other parts of the act, shows the claim that the intention of the legislature was to repeal, not *acts*, but merely *copies*, to have neither validity nor plausibility.

Not only does the judge disregard the legitimate bearing of the title of this act on the question of its import; but he also disregards many well established canons of interpretation applicable to the case. In Oates *v.* National Bank, 100 U. S. 239, 244, the law is stated by the supreme court of the United States as follows :

The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the letter of the statute, or to technical rules of construction. Wilkinson vs. Leland, 2 Pet. 627; Sedgwick, Const. and Stat. Constr. 196. And we should disregard any construction that would lead to absurd consequences. United States vs. Kirby, 7 Wall. 482. We ought rather, adopting the language of Lord Hale, to be "curious and subtle to invent reasons and means" to carry out the clear intent of the law-making power, when thus expressed. "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the

statute unless it be within the meaning of the makers." Suckley vs. Furse, 15 Johns (N. Y.), 338; People vs. Utica Ins. Co. id 357, 380.

The second ground for the decision that the act of 1856 was not repealed by the act of 1857 is stated as follows:

If the legislature, in plain terms, without designating the statute adopting the Bourland heirs, had have passed an act repealing all former statutes, it would not have had the effect of repealing the Bourland heirs act, unless the statute itself had expressly mentioned this statute.

In maintenance of this proposition the master says:

There exist many distinctions between statutes of general and local application; and one is that a statute of local application is never repealed, "except upon the most unequivocal manifestation of intent to that effect." Cooley on Constitutional Limitations, p. 183. That the statute adopting the Bourland heirs is one only of local application cannot be denied.

This conclusion is wholly erroneous, and there is nothing in Judge Cooley's work which supports or tends to support it. The proposition that when a legislature, upon the enactment of a body of laws, repeals, in plain terms, all prior statutes, it does not repeal any prior statute of local application, would seem to be too obviously erroneous to require serious refutation. Judge Cooley gives no countenance to any such proposition. On page 185 of the fourth edition of his work on "Constitutional Limitations" will be found the passage to which the master refers. It occurs in no earlier edition of the work. He says:

But *repeals by implication* are not favored; and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent of that effect.

Now an *express repeal* and a *repeal by implication* are two very different forms of legislation. A repeal by implication occurs when the provisions of the later act are repugnant to those of the earlier act, but the later act contains no clause expressly repealing such provisions.

An express repeal, on the other hand, occurs when the later act contains a clause which, in terms, repeals the earlier act. Judge Cooley says that, in order to effectuate a repeal *by implication*, the repugnancy between the later act and the earlier act should be "very clear," and especially ought the repugnancy to be very clear between a later general law and an earlier law of local application. He does not assert that a later statute, *expressly and in plain terms* repealing all prior statutes, will not repeal a prior statute of local application, unless the prior statute is particularly mentioned in the repealing act. His language, in the paragraph cited, refers not to express repeals, but to repeals by implication. In order to correctly understand the scope of his statement it will be necessary to examine the authorities upon which he bases it. He cites six cases, viz: Cass *v.* Dillon, 2 Ohio N. S. 607; Fosdick *v.* Perryburg, 14 Ohio N. S. 473, 479; Clark *v.* Davenport, 14 Iowa, 494; Covington *v.* East St. Louis, 78 Ills. 548, 550; Oleson *v.* Railway Co., 36 Wis. 383, 388; People *v.* Quigg, 59 N. Y. 83, 88.

Upon an examination of these cases it will be found that they furnish not the slightest authority for the decision that "if the legislature, in plain terms, without designating the statute adopting the Bourland heirs, had have passed an act repealing all former statutes, it would not have had the effect of repealing the Bourland heirs act, unless the statute itself had expressly mentioned this statute."

The appellees also base their claim of citizenship upon the following general provision of the Chickasaw constitution as amended in 1867:

Sec. 7. All persons, other than Chickasaws, who have become citizens of this nation, by marriage or adoption, and have been confirmed in all their rights, as such, by former conventions; and all such persons, as aforesaid, who have become citizens, by adoption of the legislature, or

by intermarriage with the Chickasaws, since the adoption of the constitution of August 18, A. D. 1856, shall be entitled to all rights, privileges, and immunities of native citizens. And all who may hereafter become citizens, either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of governor.

It is contended that this section of the Chickasaw constitution, added to Matilda Bourland's right to "settle and remain in the nation, and to be subject to its laws," the further right to share equally with the Chickasaws in the lands of the Choctaws and Chickasaws, and in all the other rights and privileges of native citizens. But I submit that this provision conferred no rights whatever upon the persons named in the act of October 17, 1856, for the following reasons:

1. That act, which was explained and limited by the constitution of August 18, 1856, conferred upon those persons no "right of citizenship" except the right "to settle and remain in the nation and to be subject to its laws." If it had not been so explained and limited, but had conferred citizenship, in general terms, and had never been repealed, it might be plausibly claimed that this constitutional amendment secured to these persons all the rights and privileges of native citizens, including the right to share in all the lands of the Choctaws and Chickasaws. But the act of 1856, so explained and limited, conferred only the right to settle and remain in the nation and to be subject to its laws. It did not confer full citizenship, but only one of the narrowest privileges of citizenship. It conferred no property rights whatever. But it was full citizenship to which the constitutional amendment of 1867 accorded all the rights, privileges, and immunities of native citizens.

2. The act of 1856 was repealed in 1859. It had been dead ten years when the constitutional amendment of

1866 was adopted. That amendment did not restore it to life.

3. After the adoption of article 43 of the treaty of April 28, 1866, it was not in the power of the Chickasaws, without the co-operation of the Choctaws, to adopt citizens into the Chickasaw nation, or to confer upon white persons any rights of citizenship whatever.

No treaty between the Choctaws and Chickasaws and the United States ever expresly authorized, in advance, the admission of white persons to full membership in the Chickasaw nation, by separate action of the Chickasaw authorities. There was, however, no obstacle, or objection, to the naturalization of white persons, by the separate, independent action of the Chickasaws, before the making of the convention, which constituted the Choctaws and Chickasaws owners, in common, of all the lands in both countries. That convention was signed, at Doaksville, on the 17th day of January, 1837, and was approved by President Van Buren, on the 24th of March, 1837. Prior to that date the property of the two nations, in both lands and moneys, was entirely separate and distinct.

But after the two nations became the owners, in common, of the country which they occupied, the naturalization of white persons by the independent action of either nation would have been in conflict with the rules of public law applicable to this new relation of the two nations. By such independent naturalization, the Chickasaws might have so augmented their membership that the citizens of their nation would have numbered three times, instead of one-third, as many as the citizens of the Choctaw nation. By that device it would have been possible for the Chickasaws to reduce the Choctaw ownership of the common country, which is now three-fourths of the whole, to one-fourth of the whole. In the absence of treaty

stipulations on the subject, the principles of public law applicable to the case would have forbidden and invalidated any such attempt, by one nation, to wrong the other. But, this wrong was also expressly interdicted by the treaty of April 28, 1866. Article 43 of that treaty contains the following provision:

> No white person * * * shall be permitted to go into said Territory, unless formally incorporated and naturalized, by the joint action of the authorities of both nations, into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article shall not be construed to affect parties heretofore adopted.

Now, while the parties to this treaty do not, in terms, declare that *full membership*, theretofore granted by one nation, without the concurrence of the other, should be thenceforth held valid, it may be plausibly contended that the stipulation had that effect. It may be plausibly claimed, therefore, that all white persons previously admitted to *full membership* in the Chickasaw nation, by the Chickasaw authorities, without the concurrence of the Choctaws, even after the date of the convention of January 17, 1837, were thereafter entitled to equal undivided interests, in common, in the lands of the Choctaws.

But this retroactive effect of the treaty of 1866 could only extend to such white persons as had been previously admitted to *full membership* in the nation. Its effect was not to declare that a white person, admitted to *limited membership* in the Chickasaw nation, by a Chickasaw statute, which, in terms, expressly excluded all rights of property, should, nevertheless, be deemed a full member of the nation, invested with the ownership of a share in the Choctaw and Chickasaw lands equal to that held by each Choctaw and Chickasaw. Its effect was not to declare that Matilda Bourland, who was admitted to *limited membership* in the Chickasaw nation, under a constitutional provision that her admission should "not give a

right, further than to settle and remain in the nation, and to be subject to its laws," should, by its retroactive operation, be transformed into a "full member" of the nation, and invested with all the rights and privileges of full membership.

Article 43 of the treaty of 1866 did not, of itself, add anything to the right conferred upon Matilda Bourland by the act of October 17, 1856, "to settle and remain in the nation, and to be subject to its laws." Nor did it authorize the Chickasaws, by either a constitutional or a statutory provision, without the concurrence of the Choctaws, to make any addition to the right so conferred. After the adoption of article 43, it would have been competent for the Choctaw and Chickasaw authorities, acting jointly, to add to the rights conferred by the act of October 17, 1856, if that act had not been repealed, or, after its repeal, to grant *de novo* to Matilda Bourland all the rights of citizenship by blood. But no such joint action was had by the authorities of the two nations.

The seventh "general provision" of the Chickasaw constitution, as amended in 1867, after the making of the treaty of 1866, was, of course, subordinate to article 43 of that treaty. It was adopted by the Chickasaws, without the concurrence of the Choctaws, and was, therefore, incapable of adding anything to the right originally conferred by the act of October 17, 1856, or of conferring *de novo* any right upon Matilda Bourland, or of empowering the Chickasaw legislature, acting alone, to do either of these things.

4. Article 38 of the treaty of 1866, even though it were exempt from the effect of article 43, would impart no validity to transfers, to white men, of interests in Choctaw or Chickasaw lands, by the Chickasaws alone, without the concurrence of the Choctaws. It certainly

did not secure full membership in the Chickasaw nation, to white persons previously admitted to merely *limited* membership by the Chickasaws acting separately; nor to white persons admitted by a Chickasaw statute, which was subordinate to a constitution restricting the right of membership, by legislative adoption, to the "right to settle and remain in the nation, and to be subject to its laws."

Nor can it be successfully contended that article 26 of the treaty of 1866 invested Matilda Bourland with all the rights of native Chickasaws. The following is article 26:

> Article 26. The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens, by adoption or intermarriage, of either of said nations, or who may hereafter become such.

This article would have no effect, even if it could override article 43 of the same treaty. The right herein referred to was merely the right to a quarter-section of land, given by the fifteenth article of the treaty. But, by the eleventh article, that right was subjected to the condition that the Choctaw and Chickasaw people should, "through their respective councils, agree to the survey and dividing of their lands, on the system of the United States." This condition was not complied with; and, therefore, no right whatever was conferred by article 15, or by article 26.

The first article of the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw nations, contains the following paragraph:

> And, pursuant to an Act of Congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole. Provided, however, no part shall ever be sold without the consent of both tribes; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

Is it claimed that this article invested Matilda Bourland with an interest in the Choctaw and Chickasaw lands? The answer is obvious. This article secured such interests, not to white persons, who had merely been permitted to "settle and remain in the nation, and be subject to its laws," but only to white persons, who had been admitted to full membership in the tribe.

IV.

Judgments Void for Want of Jurisdiction.

The judgments rendered in this case by the "Commission to the Five Civilized Tribes," known as the Dawes Commission, and by the district court in the Chickasaw nation were both void for want of jurisdiction.

All the powers possessed by the United States, except such as may have been acquired by treaties with other nations, are inherent powers of sovereignty, recognized and secured by the law of nations. Many of them are enumerated, regulated, and distributed among the different departments of the government, by the constitution; but none are derived from it. The constitution is the creature, not the creator, of the sovereign state. I will assume, for the purposes of the argument merely, that these inherent powers include the power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations; and that the possession of this power results from the paramount dominion held by the United States over all the territories within the exterior boundaries of the nation. But this power, if vested in the United States, is not included among those distributed, by the constitution, among the three departments of the government; nor is its exercise "necessary

and proper" for carrying into execution any of those powers. It is included among the "reserved powers." Its exercise has never been intrusted to congress, or to any other department of the government. It is reserved, not to the states, but to the people.

The constitutional provision that, "congress shall have power to regulate commerce with the Indian tribes," does not confer upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations. This will be plainly apparent, when we examine the text of the constitution, and consider the relations which, at the time of its adoption, existed between the United States and those nations. The following are the words of the constitution:

> The congress shall have power,—3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Looking at the words alone, we see, at once, that the regulation of commerce with foreign nations, or among the several states, or with the Indian tribes, has no possible connection with the determination of questions of citizenship in foreign nations, or in the states, or in the Indian tribes. We see, too, that, if these words were effectual to authorize congress to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, they would also authorize congress to invest such tribunals with jurisdiction to determine who are citizens of the several states and of foreign nations.

The reason why foreign nations and the Indian tribes are placed in the same category, in this clause of the constitution, is readily found. At the time of the adoption of the federal constitution, the relations between the United States and the Indian nations were acknowledged, by the United States, to be relations between treaty-making

powers. Treaties were made between Great Britain and the Chickasaws and Choctaws, during the colonial period; and twenty-three treaties have, from time to time, been made with those nations, by the United States. They were regarded by the United States as *nations*,—not, indeed, as nations wholly independent of the United States,—but as nations capable of making treaties with the United States. Their relations to the United States, at the time of the adoption of the constitution, as acknowledged by the United States, have been accurately defined in the opinions of the supreme court. In Worcester *v.* Georgia, 6 Pet. 515, 547, 557, 559, Chief Justice Marshall, delivering the opinion of the court, said:

> Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only. * *
>
> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged, but guarantied, by the United States. * *
>
> The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected, in our diplomatic and legislative proceedings, by ourselves, each having a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

In Cherokee Nation *v.* Georgia, 5 Pet. 1, 15, Chief Justice Marshall said:

They have been uniformly treated as a state, from the settlement of our country. The numerous treaties, made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

We have, then, no difficulty in understanding why the power to regulate commerce with the Indian tribes and the power to regulate commerce with foreign nations were placed on the same footing, in this paragraph of the constitution. It becomes clear, too, that the apparent effect of this clause is its real effect. It becomes clear that, if this provision empowers congress to invest tribunals, of its own creation, like the Dawes Commission, or the Chickasaw district court, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, it also confers upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of France and of Mexico, and who are British, German, or Russian subjects.

This would be all different if the constitution had invested congress with power, over the Chickasaw and Choctaw nations, broad enough, in scope, to include the regulation of their citizenship, as well as of their commerce with the United States. For then the principle established by the supreme court, in the case of The American Ins. Co. *v.* Canter, 1 Pet. 513, soon to be considered, would have been applicable to this case. Then it would have become competent for congress to invade the Choctaw and Chickasaw nations, and to do there what it could not do in one of the states,—that is to say,—to invest with judicial powers a tribunal, whose judges did not hold office during good behavior,—a mere "legislative court," not a component part of the constitutional judi-

ciary of the United States. Then the power to invest the Dawes Commission, and the district courts in the Chickasaw nation, with jurisdiction of these citizenship cases, would have been "necessary and proper for carrying into execution" a power expressly conferred upon congress by the constitution.

In American Ins. Co. *v.* Canter, 1 Pet. 513, 546, Chief Justice Marshall, delivering the opinion of the court, said:

> It has been contended that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall, from time to time, ordain and establish." Hence it has been argued that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.
>
> We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior court of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power, conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government, or in virtue of that clause, which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction, with which they are invested, is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress, in the execution of those general powers, which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised, in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government.

In this case of The American Ins. Co. *v.* Canter, the necessary power over the territories having been conferred upon congress, by the constitution, the question was, whether it was competent for congress to employ, in the execution of that power, a court, which was not a constitutional court, but to use the words of the chief justice, was a mere "legislative court." That question was de-

cided in the affirmative. And if the constitution had conferred upon congress power over the Chickasaw and Choctaw nations, as broad as that conferred upon congress over the territories, the principles established in that case would uphold the jurisdiction of the Dawes Commission and of the Chickasaw district court, in these citizenship cases. But the constitution has not conferred on congress such power over the Chickasaw and Choctaw nations.

The power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, has not been entrusted expressly or by implication to any department of the government of the United States. It is reserved to the people; and, until the people shall, by constitutional amendment, or otherwise, confer that power upon congress, it cannot be exercised by congress. It follows that, the judgments of the Dawes Commission and of the district court are void, for want of jurisdiction.

Is it contended that, congress has acquired the power to invest tribunals, of its own creation, with jurisdiction of these citizenship cases through treaties with the Chickasaws and Choctaws? The answer to this claim is fourfold. No treaty, between the United States and the Chickasaws or Choctaws, confers, or purports to confer, any such power. But if a treaty conferred this power upon the *United States*, it would, for reasons already explained, be incompetent for congress to exercise the power, without authority from the people, granted by an amendment of the constitution, or otherwise. If a treaty purported to confer this power upon *congress* specifically, it would not be competent for congress to exercise the power, without authority from the people. But then, the Chickasaw nation cannot, by stipulation, confer upon the congress, or the courts, of the United States, powers, or jurisdiction, interdicted by the constitution. The constitution of the

United States cannot be altered by a treaty with the Chickasaw nation, any more than by an act of the Chickasaw legislature.

V.

Injurious Character of the Judgments.

The following examples will illustrate the character of the judgments of the district court.

In No. 473 the district judge decided that, by virtue of the first article of the treaty of 1855, and the thirty-eighth article of the treaty of 1866, the white man A, who married a Chickasaw woman B, became at once invested with Chickasaw citizenship, not merely for jurisdictional purposes, but to all intents and purposes, and therefore acquired all the rights and privileges appertaining to Chickasaw citizenship. He decided, also, that if A, after the death of his Chickasaw wife B, married a white woman C, and white children were born of this second marriage, the white wife C and her white children all became Chickasaw citizens, holding the same vested rights. And he decided, further, that if, after the death of the white husband A, his white widow C married a second white husband D, and white children were born of this third marriage, the white man D and all his children acquired the same vested rights. And finally he decided that if the white children of these several marriages themselves married white persons, those white persons and their white children all acquired the same vested rights. In accordance with these decisions he held, in twenty-six of the pending cases, that seventy-five white persons, who were husbands of white wives, wives of white husbands, or children of white parents, were Chickasaw citizens, and that twenty-six white men, who had been husbands of Chickasaw women,

but, after their Chickasaw wives had died or been divorced, had married white women, were entitled to citizenship and acquired the same vested rights. By this ingenious process of devolution one hundred and one names were added to the roll of Chickasaw citizens.

In my brief, herewith filed, relating to the general questions involved in these citizenship cases, I have attempted to show that not one of those persons was entitled to enrollment.

By an act of the Chickasaw legislature, passed in 1856, "the right of citizenship" was granted to five white girls. The constitution, then in force, prohibited the legislature from granting any right of citizenship "further than" the right "to settle and remain in the nation and to be subject to its laws." The act was repealed in 1857, but was afterwards, by mistake, printed in compilations of the Chickasaw laws. The testimony of Judge Overton Love, on this subject, in No. 486, will be found to be "interesting reading." The district court, overruling the Dawes Commission, has, in Nos. 469, 477 and 486, enrolled, as citizens entitled to all the rights and privileges of Chickasaw citizenship, thirty-two white persons, descendants of those white girls, and husbands, or wives, of their descendants.

In the single case of The Chickasaw Nation, Appellant, *v.* Wm. Burch *et al.*, No. 517, eighty-three persons, apparently without the slightest trace of Indian blood, applied to the Dawes Commission for enrollment as citizens of the Chickasaw nation. Some of them claimed enrollment on the ground that they were descendants of a woman alleged to have been a Chickasaw, and to have lived in the state of Mississippi, near the close of the eighteenth century. The others claimed as husbands, or wives, of her descendants. The evidence produced, in maintenance of

their claims, largely hearsay, was too nebulous and flimsy to warrant a judgment even in Solon Shingle's "first-class cow case;" and they were all rejected by the Dawes Commission. But the district judge reversed the decision of that Commission, and adjudged them all to be citizens, adding eighty-three names to the roll of those entitled to share in the lands of the Choctaws and Chickasaws.

In No. 472, the clerk, acting as master, reported as follows:

John Calvin Hill is a brother of Evans Hill, and a lineal descendant of Charles Matlock, a Chickasaw Indian, who lived and died in the state of Tennessee. While Charlie Matlock was a Chickasaw Indian, there is no proof to show that he, or his descendants, with the exception of Evans Hill a brother of the applicant, had any connection with the Chickasaw tribe of Indians. John B. Hill many years ago emigrated from the state of Tennessee to the state of Texas, where he now resides. Both he and his prolific family are citizens of the United States; that they vote and exercise all other rights of citizenship of the United States, and have their domicile in the state of Texas. Under the law, as I believe it to be, if they had resided in the Indian Territory and asserted their rights to citizenship, they would have been, according to the technical rule, and no other, entitled to enrollment. But they are resident citizens of Texas, and have property and homes in the state, and, according to the fair rules of justice, they are no more entitled to citizenship.

The case was subsequently referred to a different master, who reported that Charlie Matlock was a "quarter breed Chickasaw," and that none of the applicants ever resided in the Indian Territory before they filed their applications. The Dawes Commission had rejected them all; but the district judge enrolled fifty-four, some as descendants of Matlock, and the others as husbands or wives of his descendants.

In No. 476 the master reports that "the proof of the applicants amounts to little more, if any, than a mere family tradition of Indian blood." He recommended the rejection of all the applicants. They had all been rejected by the Dawes Commission. But the case was referred to another master, who reported as follows:

I am of opinion, from the testimony of Simson and Wolfe, and from the testimony of the family tradition, that all the applicants herein are

the legal descendants of the said Nancy Frazier, who was a Chickasaw Indian, except the said Elizabeth McDuffie, S. M. Crawford, George Jarvis, and Wm. M. McCartey, who are intermarried citizens, and that they are each and all of them entitled to enrolment.

Accordingly the district judge enrolled twenty-one as descendants of Nancy Frazier, and four as husbands or wives of her descendants.

In No. 520, the master reported as follows:

It appears, from the evidence in the case, that the applicants are the descendants of Elizabeth Colbert, a Chickasaw Indian by blood, who married a man by the name of George Stewart; that the said George Stewart and Elizabeth Colbert had a daughter, by the name of Elizabeth Stewart, through whom these applicants claim; that said Elizabeth Stewart married a white man by the name of Bledsoe Holder; that said Bledsoe Holder and Elizabeth Stewart had a number of children, among them being Wm. L. Holder, Jackson A. Holder, and Burton A. Holder; that the said Bledsoe Holder and wife lived in the old Chickasaw reservation, in the state of Mississippi, and left the state of Mississippi, with the other Indians, en route to the Indian Territory, but that they stopped, with their children, in southwest Missouri, and remained there about twenty years; that they afterwards came into the Indian Territory, and finally drifted to the northern border of Texas and remained there a number of years. It appears, from the evidence, that the said Bledsoe Holder and Elizabeth Holder and their descendants, who are concerned in this application, at all times claimed to be citizens of the Chickasaw nation, and that they lived in, and about, the Chickasaw nation, from time to time, ever since they came west of the Mississippi river, and that they in fact have Chickasaw blood in their veins.

The judge thereupon added ninety-nine to the roll of Chickasaw citizens, all of whom had been rejected by the Dawes Commission.

HALBERT E. PAINE,
Atty. for Chickasaw Nation.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 496.

CHICKASAW NATION, APPELLANT,

vs.

R. C. WIGGS ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF THE INDIAN TERRITORY.

The appellees move to dismiss these cases on the several grounds set forth in the brief of counsel, which will be considered in the order there presented.

First. "Because the act of Congress which conferred jurisdiction upon the United States court for the southern district of the Indian Territory, to try this case, and which was in force at the time the judgment therein was rendered in said court, made the decision of said court final *without appeal.* The judgment appealed from was rendered in the court below on the 22d day of December, 1897, and said court finally adjourned for the term on the 26th day of March, 1898, and the law authorizing this appeal was approved July 1st, 1898."

The act of Congress authorizing the commission to the five civilized tribes in the Indian Territory "to hear and determine the application of all persons who may apply to them for citizenship in any of said nations" defined the powers of the commission as follows, viz:

> "In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for, and compel attendance of witnesses, and to send for persons and papers, and all depositions, and affidavits and other evidence, in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of the said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of the persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall hereafter be held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in the several tribes: *Provided*, That if any tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final" (*29 St., 339*).

The act of Congress authorizing appeals from the United States courts in the Indian Territory to the Supreme Court of the United States provides:

> "Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States, to either party, in all citizenship cases, and in all cases between either of the five civilized tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act, must be perfected

> in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no case shall the work of the commission to the five civilized tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

The ground of objection assigned here is simply that the legislation of Congress extending the remedy by appeal to the Supreme Court of the United States was *retrospective*, and for that reason invalid.

In *Blount vs. Windley*, 95 U. S., 180, the same objection was urged as to certain legislation by the State of North Carolina, but this court, speaking through Mr. Justice Miller, said:

> "It may be said that this legislation is retroactive; and as applied to the case before us, it is so. But there is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial and sometimes necessary. Where they violate no provision of the Constitution of the United States there exists no power in this court to declare them void."

It is true, to be sure, that statutes will be so construed as to give them only a prospective operation, where the language of the act admits of such restricted construction, but, as was said by this court in the *Twenty Per Cent. Cases*, 20 Wall., 187:

> "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature

> of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

There can be no doubt as to the meaning and intention of Congress, as declared in the terms of the act, allowing appeals from judgments already rendered in these citizenship cases.

If reason is to be sought for this extraordinary course of procedure, authorized by Congress to be taken in this peculiar class of cases, it may, perhaps, be found in the character of persons, and of subjects, with which Congress was then dealing—persons who, while not citizens of the United States and not adapted by nature or education to the intelligent use and enjoyment of the institutions which characterize the civilization of the age and country in which they live, are yet the objects of congressional solicitude and care. The means devised and employed by Congress for the protection and advancement of the interests of the Indians have of necessity been experimental and tentative, and the tribunals erected from time to time for the administration and determination of their affairs, while clothed with some of the forms of courts, have yet been only commissions whose judgments have none of the sanctity or finality of courts established under the Constitution. Some of the five civilized nations have State governments, possessing all the forms and features of the constitutional governments within the United States—governors, legislatures, and judicial courts—yet none of these are recognized as exercising the authority and power of the governments of the States of the Union.

In the act of Congress of June 10, 1896, making appro-

priations for the Indian Department and for fulfilling treaty stipulations with the various Indian tribes, the authority to the commission to the five civilized tribes to hear and determine the application of persons for citizenship in any of said nations was enlarged and continued, and, as indicative of the sense of Congress, that the plans hitherto adopted had proved ineffective it was provided:

> "It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof" (29 Statutes, 340).

There had been tried in succession the Indian councils, the "Dawes" commission, the United States district court as tribunals by which these questions of citizenship might be determined, and all had proven unsatisfactory. By the act of 1898 it was thought proper to extend the remedy still further, and the right of appeal to the Supreme Court of the United States was allowed.

Counsel for appellee is in error in the statement in this assignment of error in his brief that the act of Congress which conferred jurisdiction on the district court "made the decision and judgment of said court final *without appeal.*" That act does provide "that the judgment of the court shall be final," but not that it shall be "without appeal." The term "final" was used in the sense in which it is employed with reference to the decrees and judgments of other courts, viz., that it ended the litigation. A final decree in a chancery suit in the same way ends the cause, but does not preclude an appeal; and here, if the right of appeal to the Supreme Court had then existed, this language might with propriety have been used with reference to the judgment of the district court.

Congress, in enlarging the remedies already provided for

the ascertainment and determination of the rights of persons and of the Indian tribes by adding this right of appeal to the Supreme Court and making it, in express terms, applicable to judgments already rendered in citizenship cases, was acting within the scope of its rightful powers. The Federal Constitution nowhere prohibits retrospective legislation by Congress or by the States; and it cannot be reasonably contended that the creation of a new or additional remedy, which by the law is made applicable to existing judgments, is obnoxious to any principle of right or justice unless the rights of third parties are affected injuriously or the *status quo* of the parties has been changed so as that the judgment creditor would be injured by the enforcement of the act.

Suppose, instead of allowing an appeal to the existing judgment debtor, the act had allowed an additional remedy to the judgment creditor, as, for instance, that his judgment might be satisfied by the levy of a *fieri facias* on the land of the debtor instead of the expensive and laborious remedy of a bill in chancery to subject the same to the lien of the judgment, could the debtor complain that his "vested rights" were disturbed?

> "There is no doubt of the legislature to pass statutes which reach back to, and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the State constitution, and provided further that no other objection exists to them than their retrospective character."
>
> Cooley Con. Lim., page 369.

Second. The act of Congress of the 1st day of July, 1898, is unconstitutional and invalid—

> "because the same is an invasion of the rights and provinces of the Judiciary Department of the Government by the Legislative Department, because the same disturbs and destroys vested and valuable rights and deprives the appellees of their property without due process of law."

The legislature cannot control the action of the courts by requiring of them a construction of the law according to its views, but at variance with the views of the court. It cannot set aside the judgments of the courts or compel them to grant new trials or to discharge offenders or direct what particular steps the court shall take in the progress of judicial inquiry (*Cooley Con. Lim., page* 94). But, whatever objections may lie to legislation which creates new remedies and makes them applicable to existing judgments, it cannot be contended that it is an invasion of the judicial domain. Legislation which disturbs and destroys vested rights cannot, with propriety, be said, for that reason, to be "an invasion of the rights and provinces of the Judiciary Department," for the Judiciary Department has no more authority than the Legislative to disturb vested rights.

But does this legislation disturb vested rights?

Judge Cooley says (*Con. Lim.*, 358):

> "And it would seem that a right cannot be regarded as a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.
>
> "But there are many cases in which, by existing laws, defenses based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defense if it possesses the power to do so. In regard to these cases, we think investigation of the authorities will show that a party has no vested right in a defense based upon an informality not affecting his substantial equities."

There is no vested right in the defense of limitations or of usury. (See *Campbell vs. Holt*, 118 U. S., 620.) Statutes have been upheld as valid which cured defects in the acknowledgments of deeds, validated irregular marriages, and gave health and vigor to imperfect contracts.

In *Ex parte McCardle*, 7 Wallace, 506, the petitioner was deprived of his personal liberty. The circuit court had denied his petition for discharge on *habeas corpus*. He had appealed to this court under the statute, which was then in force, giving him the right of appeal. While his case was pending here Congress repealed the law which allowed the appeal, and this court dismissed his case for want of jurisdiction, because he had no vested right in the remedy which was in existence when this court took jurisdiction.

In *Freeland vs. Williams*, 131 U. S., 406, Freeland obtained judgment against Williams in an action of trespass in the State court of West Virginia, and this judgment was on writ of error affirmed by the court of appeals of that State. Subsequently a constitutional provision was adopted, prohibiting the enforcement of judgments obtained in actions of trespass for acts done "according to the usages of civilized warfare." The legislature, proceeding to carry this provision into effect, provided that in such cases a bill in chancery might be filed to set aside the judgment. Such bill was brought by Williams, with the result that the judgment was set aside. On writ of error from this court that decree was affirmed.

In *Garrison vs. City of New York*, 21 Wallace, 197, the legislature of New York had on the 17th May, 1869, passed an act for widening and straightening Broadway. It required commissioners to cause certificates and maps of the location of the new lines to be filed in certain public offices in New York, and declared that such maps and certificates should be final and conclusive. It required that certain other commissioners to be appointed by the supreme court should make assessments of damages for private property affected. In this case all that the act required was done, and the report of the assessing commissioners was duly returned to, filed in, and on the 28th December, 1870, confirmed by the supreme court.

On the 27th February, 1871, nearly two months after the

confirmation of the report, the legislature by act authorized an appeal to be taken from the order of confirmation. This act provided "that if it should appear that there was any error, mistake, or irregularity or illegal act in the proceeding at any stage, or that the assessments for benefit, or the awards of damage, or either of them, had been unfair and unjust, or inequitable or oppressive as respects the city or any person affected thereby, the court or justice should vacate the order of confirmation."

On writ of error from this court, it was held that the legislation was valid, saying:

> "It is her (the State) duty to see that the estimates made are just not merely to the individual whose property is taken, but to the public which is to pay for it, and she can, to that end, vacate, or authorize the vacation of any inquest taken by her direction to ascertain particular facts for her guidance. * * * Nor do we perceive how this power of the State can be affected by the fact that she makes the findings of the commissioners upon the inquest, subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings. There is certainly nothing in the fact that an appeal is not allowed from the action of the court in such cases, which precludes a resort to other methods for the correction of the finding where irregularity, mistake or fraud has intervened."

Surely the reasoning which controlled the court in that case must be allowed to have equal cogency here, where the facts and proceedings were so strikingly similar.

In *Louisiana vs. Mayor of New Orleans*, 109 U. S., 286, judgments for a large amount had been recovered against the city for damages done to private property by rioters. By provision of the State constitution adopted subsequent to the judgments, the power of the city to impose taxes was so restricted as to make it unable to pay the judgments. On mandamus to compel the city authorities to make levies and

pay the judgments, the supreme court of the State denied the writ, and that judgment was, on error, affirmed by this court. Mr. Justice Field, speaking for this court, held that such a judgment was not a contract within the contract clause of the Federal Constitution, and that "the relators have no such vested right in the taxing power of the city as to render its diminution by the State to a degree affecting the present collection of their judgments a deprivation of their property in the sense of the constitutional prohibition. A party cannot be said to be deprived of his property in a judgment because at the time he was unable to collect it."

The act of Congress merely conferred a remedy which had not before existed; it did not attempt or operate to interfere in any way with the function of the judicial department of the Government. If Congress has constitutional power to take away the existing right of appeal, it is difficult to understand why it has not, with more obvious propriety, the power to confer such right. Where a litigant, having under existing laws a right of appeal, neglects this right and allows it to expire by the law of its own limitation, there would seem to be grave reasons why the legislature should not interpose, after the right of appeal had expired, and attempt by special legislation to resuscitate it. The same objection would seem to exist to such legislation as has so often been enforced to attempt by the legislature to grant new trials.

Story, Constitution, sec. 1379.
Butler *vs.* Palmer, 4 Hill, 324.
Wilkinson *vs.* Leland, 2 Peters, 660.
Calder *vs.* Bull, 3 Dallas, 386.

In *Convers vs. Burrows & Prettyman*, 2 Minn., 229, the act of March 1, 1856, allowed an appeal "from an order granting a new trial." It was objected that this was unconstitutional. The court said (page 240):

"The object of the act is evidently to extend the right of appeal beyond what previously existed. It is a remedial law, and should receive a liberal construction. It provides a remedy in a case where otherwise injustice might be done, and should be given effect in all cases where proceedings have not been had to such an extent as to exclude its application. Statutes of this nature may be considered *ultra*, but not *contra*, the strict letter (1 Kent, 465), and the doctrine that statutes retrospective in their effect are unconstitutional is held not to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute invested rights (1 Kent, 455). We cannot perceive how the act giving the right of appeal in this case impairs in any manner the contract between the parties or affects any vested right of the defendants."

In the naval appropriation act of March 3, 1873 (17 St., 556), it was enacted—

"That the Supreme Court may, if in its judgment the purposes require it, allow any amendment, either in form or substance, of any appeal in prize cases, or allow a prize appeal therein, if it appears that any notice of appeal, or of intention to appeal was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein."

This rather startling legislation was enforced by this court in the case of *The Nuestra Senora de Regla*, 17 Wallace, 29.

We submit that there has been no disturbance of any vested right of these appellees or any impairment of their constitutional rights of any sort. Some text books, as Sutherland on the Construction of Statutes, do state in general terms that an appeal cannot be allowed after judgment, but the cases cited as authority for the statement do not sustain it, and Burch *vs.* Newberry, 10 N. Y., 374, relied on by counsel for appellee in his brief, will be found on examination

to decide no more than is allowed to it by Judge Cooley (Co. Lim., 96), where he says that it held "that the legislature had no power to grant to parties a right to appeal *after it was gone under the general law.*"

In *State vs. Northern Central R. R. Co.*, 18 Maryland, 193, the legislature authorized the court of appeals to hear and determine an appeal in the case, the right to which did not otherwise exist. The court said:

> "The act above cited does not divest any right or infringe upon the judicial powers of the court. It refers to it all such questions as may fairly be presented by the transcript."

In *Calder vs. Bull*, 3 Dallas, 386, it is said:

> "If any one has a right to property, such right is a perfect and exclusive right, but no one can have such right before he has acquired a better right to the property than any other person in the world; a right therefore only to recover property cannot be called a perfect and exclusive right."

The right which is here claimed to be a "vested right" is exemption and immunity from review or supervision of the judgment which he has obtained in the district court.

He certainly has the same vested right in his judgment that he had in the original cause of action, and he has no more or other right. If his judgment was rendered erroneously it tends to defeat justice and pervert equity. The holder of such judgment can "have no vested right to do wrong."

The legislature does not impair his rights or deprive him of his property when it seeks, by the creation of further and more stringent remedies, to have that judgment examined to the end that it may be seen whether it does in truth effectuate the law.

> Third. "Because the act of Congress approved July 1st, 1898, authorizing the appeal in this and similar

> cases, if valid for any purpose, only authorized appeals to be taken in cases, and upon questions involving the constitutionality and validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory."

The statute itself is its best interpreter. Referring to it, we find that it expressly provides as follows:

> "Appeals shall be allowed from the United States courts in the Indian Territory, direct to the Supreme Court of the United States, to either party, IN ALL CITIZENSHIP CASES, AND, in all cases between either of the five civilized tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands &c."

So here were two distinct classes of cases provided for in this act—one being "in all citizenship cases," the other being in cases between either of the five civilized tribes and the United States. This case comes within the first class and does not involve the constitutionality or the validity of the legislation affecting citizenship or the allotment of lands.

On the whole case we submit that the only question presented on this motion to dismiss is whether the act of 1898 does disturb any vested right of the appellee or deprive him of any property, and on that question we submit the case with confidence.

HOLMES CONRAD,
Of Counsel for Appellant.